No.

IN THE

Supreme Court of the United States

GERALD P. MITCHELL,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court of Wisconsin

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In both *Missouri v. McNeely* and *Birchfield v. North Dakota*, this Court referred approvingly to "implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply" with tests for alcohol or drugs when they have been arrested on suspicion of driving while intoxicated. 569 U.S. at 141, 161 (2013); 136 S. Ct. 2160, 2185 (2016). But a majority of states, including Wisconsin, have implied-consent laws that do something else entirely: they authorize blood draws without a warrant, without exigency, and without the assent of the motorist, under a variety of circumstances—most commonly when the motorist is unconscious. State appellate courts have sharply divided on whether such laws comport with the Fourth Amendment.

The question presented is:

Whether a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement.

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OPINIONS BELOW

The opinion of the Supreme Court of Wisconsin (App., *infra*, 1a-57a) is reported at 914 N.W.2d 151. The certification of the case to that court by the state court of appeals (App., *infra*, 58a-71a) is unreported. The opinion of the circuit court (App., *infra*, 72a-125a) is unreported.

JURISDICTION

The Supreme Court of Wisconsin issued its decision on July 3, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Wisconsin Stat. § 343.305(3)(b) provides: "A person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subsection, and if a law enforcement officer has probable cause to believe that the person has violated s. 346.63 (1), (2m) or (5) or a local ordinance in conformity therewith, or s. 346.63 (2) or (6) or 940.25, or s. 940.09 where the offense involved the use of a vehicle, or detects any

presence of alcohol, controlled substance, controlled substance analog or other drug, or a combination thereof, on a person driving or operating or on duty time with respect to a commercial motor vehicle or has reason to believe the person has violated s. 346.63 (7), one or more samples specified in par. (a) or (am) may be administered to the person."

STATEMENT

Without obtaining a warrant, police directed the taking of petitioner's blood while he was unconscious following his arrest for driving while intoxicated. There was no evidence of any exigency preventing the police from obtaining a warrant, and the state has disclaimed any reliance on the exigency exception to the warrant requirement.

Instead, the state relied on Wis. Stat. § 343.305(3)(b). That statute, part of Wisconsin's implied-consent law, allows the taking of a person's blood if the person is unconscious and the police have probable cause to suspect drunk driving.

Petitioner challenged the warrantless blood draw as contrary to the Fourth Amendment, but a divided Supreme Court of Wisconsin found no constitutional violation. The court could not agree on a rationale, however. Three justices would have held that the state's implied-consent law, by "deeming" motorists to have consented, supplies actual, constitutional consent to the taking of blood—that is, the implied-consent law is itself an exception to the warrant requirement. Two concurring justices opined that "the state can[not] waive the people's constitutional protections against the state" but nevertheless upheld the blood draw on the theory

that a blood draw from an unconscious drunk-driving suspect is, categorically, a lawful search incident to arrest. (The justices reached this conclusion despite this Court's holding, in *Birchfield*, that while breath tests are valid searches incident, blood draws are not. 136 S. Ct. at 2184 (2016).) Two dissenting justices agreed with the concurrence that statutes cannot "deem" constitutional consent into existence, but rejected the concurrence's search-incident theory. They would have suppressed the blood draw evidence.

The Wisconsin court's divisions reflect a nationwide controversy. Provisions like Wisconsin's are widespread: twenty-nine states have laws sanctioning warrantless blood draws from unconscious intoxicated driving suspects.[1] Since

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[1] *See* ALA.CODE 1975 § 32-5-192 (b); ALASKA STAT. § 28.35.035 (b); ARIZ. REV. STAT. ANN. § 28-1321 C; ARK. CODE ANN. § 5-65-202 (b); CAL. VEH. CODE § 23612(a)(5); COLO. REV. STAT. § 42-4-1301.1(8); FLA. STAT. § 316.1932(1)(c); GA. CODE ANN. § 40-5-55 (b); 625 ILL. COMP. STAT. 5/11-501.1 (b); IOWA CODE § 321J.7; KY. REV. STAT. ANN. § 189A.103(2); LA. REV. STAT. ANN. § 32:661 B; MD. CODE ANN., CTS & JUD. PROC. § 10-305 (c); MO. REV. STAT. § 577.033; MONT. CODE. ANN. 61-8-402 (3); NEV. REV. STAT. § 484C.160; N.H. REV. STAT. ANN. § 265-A:13; , N.M. STAT. ANN. § 66-8-108; N.C. GEN. STAT. § 20-16.2(b); OHIO REV. CODE ANN. § 4511.191 (4); OKLA. STAT. TIT. 47, §751; ORE. REV. STAT. § 813.140; S.C. CODE ANN. § 56-5-2950 (H); TEX. TRANSP. CODE ANN. § 724.014 (WEST); UTAH CODE ANN. § 41-6a-522; VT. STAT. ANN. § 1202 (a) (2); W. VA. CODE, § 17C-5-7 (a); WIS. STAT. § 343.305(3)(b); WYO. STAT. ANN. 1977 § 31-6-102 (c).

McNeely revived the warrant requirement for drunk-driving blood draws, seven states' appellate courts have struck down such provisions. Another seven states have struck down or limited related implied-consent provisions, or declared that such statutes cannot substitute for voluntary consent as an exception to the warrant requirement. On the other hand, six states (excluding Wisconsin) have held that implied-consent laws provide blanket Fourth Amendment consent to the taking of blood, so that neither a warrant nor exigent circumstances are required.

This case is an opportunity for the Court to resolve an important constitutional question: can state legislatures obviate the warrant requirement by "deeming" their citizens to have consented to Fourth Amendment searches?

A. Factual Background

In May of 2013, petitioner Gerald P. Mitchell was arrested for operating while intoxicated. App., *infra*, 2a-3a. Officers took him first to the police station, but on the way there he became lethargic, and the police determined a breath test wouldn't be feasible. *Id.* at 5a. So, they took him to a hospital, where an officer read him a statutorily mandated form regarding the implied-consent law. *Ibid.* Petitioner was too incapacitated to indicate whether he consented or not, and was soon unconscious. His blood was drawn about an hour after his arrest. *Id.* at 6a. No warrant was sought. *Id.* at 5a.

B. Procedural Background

Petitioner was charged with operating while intoxicated and with a prohibited alcohol

concentration. App., *infra*, 6a. He moved to suppress the blood test results on the ground that his blood was taken without a warrant and without exigent circumstances. *Ibid.* The state agreed there was no exigency, but argued that, by operation of statute, petitioner had consented to the test by driving, and had not withdrawn his consent. *Id.* at 4a, 117a. The trial court upheld the search, relying on the implied-consent statute. *Id.* at 4a, 121a-23a. The state introduced the test results at petitioner's jury trial, and he was convicted of both counts. *Id.* at 4a-5a.

Petitioner appealed the suppression decision, and the court of appeals certified the case to the Supreme Court of Wisconsin, noting a single issue: "whether the warrantless blood draw of an unconscious motorist pursuant to Wisconsin's implied consent law, where no exigent circumstances exist or have been argued, violates the Fourth Amendment." App., *infra*, 58a. It explained that while this Court has "referred approvingly [to] the general concept of implied consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply... it has yet to decide whether the 'implied consent' that flows from a statutory scheme constitutes actual Fourth Amendment consent." *Id.* at 63a-64a. It observed that some state courts have "concluded that statutory implied consent satisfies the Fourth Amendment" while others "have reasoned that such implied consent is a legal fiction that does not take into account the totality of the circumstances as required by" this Court, and so cannot sustain a warrantless search. *Id.* at 64a.

The Supreme Court of Wisconsin accepted certification. It ultimately upheld the search by a 5-2 vote, but there was no majority for any rationale.

One three-justice bloc analogized a person's decision to drive to entering one of the "pervasively regulated businesses [or] closely regulated industries" that are subject to certain warrantless searches. App., *infra*, 12a-13a; *see Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970). It went on to assert that, because *Birchfield* had approved civil penalties for refusing consent to a blood draw, it had also (silently) approved statutes legislating consent into existence: "because it is constitutionally permissible to impose civil penalties as a consequence for refusing to submit to a blood draw... Wisconsin's implied-consent statutes... describe a context consistent with Birchfield where constitutionally sufficient consent to search arises through conduct." App., *infra*, 18a-19a.

Two concurring justices, in an opinion authored by Justice Daniel Kelly, "incorporate[d] in toto" his analysis from a prior case, *State v. Brar*, 898 N.W.2d 499 (Wis. 2017). App., *infra*, 34a-35a. In that case, he had refused to join the same three-justice bloc noted above because its discussion "misunderstands how our implied consent law functions, [saying] 'consent' implied by law is something voluntarily given when such a thing is impossible, [and] introduces a destructive new doctrine that reduces constitutional guarantees to a matter of legislative grace." *Brar*, 898 N.W.2d at 511.

Justice Kelly went on, in Brar, to call it

> a metaphysical impossibility for a driver to freely and voluntarily give "consent" implied by law. This is necessarily so because "consent" implied by law isn't given by the driver. If it is given by anyone, it is given by the legislature through the legal fiction of "deeming."... One only "deems" when the thing deemed did not really happen, but you intend to act as though it did. So it makes no sense to ask if the driver freely and voluntarily gave something he manifestly did not give in the first place.

Id. at 515-16.

Nevertheless, in the concurring opinion in *this* case, Justice Kelly held the blood draw constitutional even in the absence of actual consent. Though it is not completely clear, he appeared to conclude the taking of blood was a valid search incident to arrest, relying on his reading of *Birchfield*, *McNeely*, and *Schmerber v. California*, 384 U.S. 757 (1966). App., *infra*, 38a-42a.

Regarding the dissent's observation that *Birchfield* had said, regarding unconscious motorists, "the police may apply for a warrant if need be," Justice Kelly responded that *Birchfield*'s "central logic is actually self-contradictory" and that the Court had spoken "with two contradictory voices in one opinion" such that "the best we can do is follow its logic until it starts contending with itself." App., *infra*, 42a.

Finally, two justices dissented in an opinion by Justice Ann Walsh Bradley. The dissenters would have held that "'implied consent' is not the same as 'actual consent' for purposes of a Fourth Amendment search" and said by concluding otherwise, the lead

opinion would "create a statutory per se exception to the ... warrant requirement." App., *infra*, 47a.

REASONS FOR GRANTING THE PETITION

I. State appellate courts are deeply divided on whether implied-consent laws create an exception to the warrant requirement

As noted above, twenty-nine states have "unconscious clauses" in their implied-consent laws. Appellate courts in seven states have held such clauses inconsistent with the Fourth Amendment. Courts in seven other states have ruled that different, but related, provisions of their implied-consent laws violated the Constitution in the same way: by authorizing blood draws regardless of a motorist's actual consent. On the other hand, the appellate courts of seven states have held that implied-consent laws supply actual, Fourth Amendment consent, such that police may take a suspected motorist's blood with no warrant, even in the absence of exigent circumstances.

A. Seven state appellate courts have held that provisions for warrantless blood draws of unconscious motorists are unconstitutional

Courts in Arizona, California, Georgia, Kansas, North Carolina, Pennsylvania and Texas have issued decisions that would have compelled a different result than the one the Wisconsin court reached. All have held that statutes purporting, in the name of "implied consent," to allow warrantless blood draws from unconscious motorists are unconstitutional.

Some courts have reasoned that blanket legislative declarations of "consent" simply have nothing to do with the individual, factual, voluntary consent this Court has established as a warrant exception. That is, equating the two is simple linguistic conflation—wordplay. Or, as the court said in *People v. Arredondo*, "A state legislature does not have the power to 'deem' into existence 'facts' operating to negate individual rights arising under the federal constitution." 199 Cal. Rptr. 3d 563, 574, (Cal. Ct. App. 2016), *rev'w granted and opinion superseded*, 371 P.3d 240 (Cal. 2016).

The *Arredondo* court called "implied consent" "a misleading, if not inaccurate, label in this context. Certainly consent sufficient to sustain a search may be 'implied' as well as explicit, but it is nonetheless *actual* consent, 'implied' only in the sense that it is manifested by *conduct* rather than words." *Id.* at 571 (emphasis in original). "Nothing here resembles this 'implied consent.' The mere operation of a motor vehicle is not a manifestation of *actual* consent to a later search of the driver's person. To declare otherwise is to adopt a construct contrary to fact." *Id.* (emphasis in original).

This was especially true, said the court, of drivers from out of state who happened to cross into California. "These drivers cannot be argued to have consented in fact to a search of their persons. They have not been asked to agree, or told that they have a choice, or apprised of the consequences that will flow from their conduct.... The statute makes their conduct the legal equivalent of consent regardless of their knowledge, intentions, or understanding." *Id.* at 573.

Likewise in *Williams v. State*, the Supreme Court of Georgia held that "mere compliance with statutory implied consent requirements does not, per se, equate to actual, and therefore voluntary, consent on the part of the suspect so as to be an exception to the constitutional mandate of a warrant." 771 S.E.2d 373, 377 (Ga. 2015). Following *Williams*, the court of appeals applied this rule in *Bailey v. State*, holding a driver's "implied consent was insufficient to satisfy the Fourth Amendment, and he could not have given actual consent to the search and seizure of his blood and urine, as he was unconscious." 790 S.E.2d 98, 104 (Ga. Ct. App. 2016), *overruled on other grounds by Welbon v. State*, 799 S.E.2d 793 (Ga. 2017).

Relatedly, several courts have noted that these statutes deem searches "consensual" without requiring any assessment of whether a motorist's supposed consent is voluntary under the "totality of all the circumstances," as this Court has long required. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). Thus, the Supreme Court of North Carolina: "[t]reating [the statute] as an irrevocable rule of implied consent does not comport with the consent exception to the warrant requirement because such treatment does not require an analysis of the voluntariness of consent based on the totality of the circumstances." *State v. Romano*, 800 S.E.2d 644, 652 (N.C. 2017).

The Texas high court employed the same reasoning in *State v. Villarreal*, saying implied consent as a warrant exception cannot "be squared with the requirement that, to be valid for Fourth Amendment purposes, consent must be freely and voluntarily given based on the totality of the

circumstances, and must not have been revoked or withdrawn at the time of the search." 475 S.W.3d 784, 800 (Tex. Crim. App. 2014). (*Villareal* did not concern an unconscious motorist; the subsequent case of *State v. Ruiz* did, and the court reached the same result. 545 S.W.3d 687, 693 (Tex. App. 2018), *review granted* (Apr. 25, 2018).) *See also State v. Dawes*, No. 111310, 2015 WL 5036690, slip op. at 5 (Kan. Ct. App. Aug. 21, 2015) (under implied-consent statute, officer contemplates only certain statutory facts, rather than "the rest of what was going on ... 'the totality of the circumstances'").

And, in *Commonwealth v. Myers*, the Supreme Court of Pennsylvania interpreted that state's implied-consent statute not to authorize blood draws from unconscious motorists. 164 A.3d 1162, 1172 (Pa. 2017). However, it went further, saying that if it *had* interpreted the statute this way, it would be unconstitutional, because such "consent" does not satisfy the requirement that "voluntariness is evaluated under the totality of the circumstances." *Id.* at 1176.

Courts have also observed that implied-consent statutes authorizing blood draws create *per se*, categorical exceptions to the warrant requirement—a species of exception this Court has repeatedly rebuffed, most recently in *McNeely*, 569 U.S. at 158. Thus, per the North Carolina court:

> [I]n *McNeely*, though [it] only specifically addressed the exigency exception to the warrant requirement, the Court spoke disapprovingly of per se categorical exceptions to the warrant requirement, *id.* ("While the desire for a bright-line rule is understandable, the Fourth Amendment will not tolerate adoption of an overly

> broad categorical approach that would dilute the warrant requirement in a context where significant privacy interests are at stake.... [A] case-by-case approach is hardly unique within our Fourth Amendment jurisprudence.").

Romano, 800 S.E.2d at 653 (citations omitted); see also *Dawes*, No. 111310, 2015 WL 5036690, slip op. at 5 (informed-consent statutes create "a categorical exception to the warrant requirement, and they accordingly run afoul of the ruling in *McNeely*"); *State v. Havatone*, 389 P.3d 1251, 1255 (Ariz. 2017), ("unconscious clause" could not support a blood draw absent "case-specific exigent circumstances").

B. Courts in seven other states have held that implied-consent laws do not supply the consent required by the Fourth Amendment

Though Petitioner has not counted them among the seven states squarely holding implied-consent statutes cannot validate a warrantless blood draw from an unconscious motorist, seven other jurisdictions have concluded, in other contexts, that implied-consent statutes cannot supply the voluntary consent the Fourth Amendment requires.

For example, South Dakota's implied-consent law simply authorizes the taking of blood: conscious or not, a motorist has no opportunity under the statute to refuse. S.D. CODIFIED LAWS § 32-23-10. So in *State v. Fierro*, a case involving a conscious motorist who did not, factually, consent to a blood draw, the Supreme Court of South Dakota held the law unconstitutional because it authorized "consent" searches where actual, "free and voluntary consent" was absent. 853 N.W.2d 235, 241 (S.D. 2014).

Similar results were had in *People v. Turner*, 97 N.E.3d 140, 152 (Ill. App. Ct. 2018) and *Byars v. State*, 336 P.3d 939, 946 (Nev. 2014).

Other courts have struck down statutory provisions authorizing implied-consent blood draws before going on to consider whether, under the totality of the circumstances, the driver actually gave voluntary consent. *Flonnory v. State*, 109 A.3d 1060, 1065 (Del. 2015); *State v. Pettijohn*, 899 N.W.2d 1, 26–27 (Iowa 2017) ("[T]he clear implication of the *McNeely* decision is that statutorily implied consent to submit to a warrantless blood test under threat of civil penalties for refusal to submit does not constitute consent for purposes of the Fourth Amendment."); *State v. Modlin*, 867 N.W.2d 609, 619 (Neb. 2015).

Finally, one court, faced with a statute that facially authorized blood draws without regard to actual consent, found the blood draw at issue unlawful but refrained from invalidating the statute, deciding instead that the its language could be read to authorize *warranted* searches. *State v. Wells*, No. M2013-01145-CCA-R9CD, 2014 WL 4977356, slip op. at 13, 19 (Tenn. Crim. App. Oct. 6, 2014).

C. Six states (again excluding Wisconsin) have held that implied-consent laws constitute an exception to the warrant requirement, at least with respect to unconscious drivers

In contrast to the decisions discussed above, other states' courts have determined that implied-consent laws can provide a *per se* exception to the warrant requirement. These courts' analyses have

typically viewed *Birchfield* as blessing (or at least not forbidding) this conclusion.

The most cited of these decisions is *People v. Hyde*, 393 P.3d 962 (Colo. 2017), another case involving an unconscious motorist. There, the supreme court relied on *Birchfield*'s sanctioning of "the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. Petitioners do not question the constitutionality of those laws, *and nothing we say here should be read to cast doubt on them.*" *Hyde*, 393 P.3d at 968 (emphasis added by Colorado court) (citing *Birchfield*, 136 S.Ct. at 2185).

The court allowed that *Birchfield* had rejected implied-consent laws imposing criminal penalties for refusal, but noted that Colorado's imposed only civil ones. From this, the court concluded (without further explanation) that because legislatures may levy civil penalties on motorists who refuse a blood draw, they may also simply *authorize* such blood draws, regardless of actual consent. *Id.* (The Court of Appeals of Virginia took the same route on the way to announcing an "implied consent exception to the search warrant requirement." *Wolfe v. Commonwealth*, 793 S.E.2d 811, 814-15 (Va. Ct. App. 2016).).

In a discussion echoed by the three-justice lead opinion in petitioner's case, App., *infra*, 10a-13a, three concurring justices in *Hyde* noted *Birchfield*'s reference to *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). *Hyde*, 393 P.3d at 971-72 (Eid, J., concurring) (citing *Birchfield*, 136 S. Ct. at 2185). From this one citation, the concurrence went on to equate driving on a road to operating a "highly regulated business[]"

such that a driver's voluntary consent could be inferred from "context." *Id.* The Florida appellate court cited both *Hyde*'s majority and its concurrence with approval, and reached the same result. *McGraw v. State*, 245 So. 3d 760, 767 (Fla. Dist. Ct. App. 2018), *review granted*, No. SC18-792, 2018 WL 3342880 (Fla. July 9, 2018).

Three other courts have raised distinct rationales for allowing warrantless searches pursuant to implied-consent statutes. First, the high court of Oklahoma held that its statute—which authorized warrantless blood draws only in cases of an accident involving death or great bodily injury—created an acceptable *per se* exigency, as distinct from the *per se* exigency this Court rejected in *McNeely*. *Cripps v. State*, 387 P.3d 906, 909 (2016), *cert. denied*, 137 S. Ct. 2186, (2017).

Meanwhile the Court of Appeals of Ohio, in *State v. Speelman*, said (like the concurrence in this case below, App., *infra*, 42a-44a) that a blood draw from an unconscious motorist was a valid search incident to arrest, despite *Birchfield*'s holding that blood draws are not. 102 N.E.3d 1185, 1188 (Ohio Ct. App. 2017). The court opined that the *Birchfield* Court assumed the existence of the less-invasive breath test, which is unavailable when a motorist is unconscious. *Id.*

Finally, the Idaho Court of Appeals held that under its implied-consent law, a motorist's operation on Idaho highways supplied actual, constitutional consent. That state's supreme court had earlier applied a saving construction to the statute—it read it to permit a motorist to withdraw consent, though there was no such provision in the statute's text.

Bobeck v. Idaho Transp. Dep't, 363 P.3d 861, 866 (Idaho Ct. App. 2015) (citing *State v. Halseth*, 339 P.3d 368, 371 (Idaho 2014) and *State v. Arrotta*, 339 P.3d 1177, 1178 (Idaho 2014)). The court of appeals held that, since the unconscious motorist obviously did not actually withdraw this consent, her warrantless blood draw was constitutional. *Bobeck v. Idaho Transp. Dep't*, 363 P.3d 861, 867 (Ct. App. 2015).

II. The decision below is wrong

Certiorari is also warranted because the decision below is not compatible with this Court's precedent. Though the Wisconsin court did not reach a majority for any rationale, the *result* it reached can't be sustained on any theory. By sanctioning a statutory declaration that a particular class of searches necessarily passes constitutional scrutiny, the Wisconsin court, and others like it, are permitting (and inviting) legislatures to carve out a new Fourth Amendment exception of "deemed consent."

Though "implied-consent" statutes have "consent" in the name, what they prescribe in cases like this one has nothing to do with the "voluntary consent" that this Court has established as an exception to the warrant requirement. "Voluntary consent" is a choice made by a person the police wish to search—a "free and unconstrained" choice, as demonstrated by the "totality of all the circumstances." *Schneckloth*, 412 U.S. at 225, 227. As many courts have observed, implied-consent statutes don't just dispense with the totality of the circumstances: they give the suspect motorist no choice at all. Such statutes' only link to the notion of

"consent" is a sort of rhetorical gesture toward the concept: a declaration that a certain class of people—motorists—are "deemed to have given consent" to having their blood taken. But this declaration—what the California court called "imputed" consent—is manifestly not a choice by the motorist: it is a choice by the legislature. *Arredondo*, 199 Cal. Rptr. 3d at 571.

A state legislature is not free to extinguish rights granted by the Constitution. And it is clear that, *contra* some state courts, a motorist does have a Fourth Amendment right to refuse a blood draw, absent a warrant or exigency. Some state court opinions blessing implied-consent blood draws have claimed to the contrary, citing *South Dakota v. Neville*, 459 U.S. 553 (1983). *Neville* did say that "a person suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test," *id.* at 560 n.10, but it was talking about the *Fifth* Amendment, not the Fourth. As this Court said in *Skinner v. Railway Labor Executives' Ass'n*, "a compelled intrusio[n] into the body for blood to be analyzed for alcohol content must be deemed a Fourth Amendment search." 489 U.S. 602, 616 (1989). And, of course, what the Fourth Amendment says about searches is that the people have the right to "be secure ... against" them—i.e., to *refuse* them.

The Court removed any doubt about this right in *McNeely*. In holding that blood draws of suspected drunk drivers would not always fall within the exigency exception, *McNeely* presupposed that, to be permissible, blood draws would *need* to satisfy a warrant exception. This is only true, of course, if the

Fourth Amendment generally forbids them, absent a warrant.

Nor (as some state courts have also suggested) did *Birchfield* sanction warrantless searches like the one here. When *Birchfield* spoke favorably of implied-consent laws, it was talking about a particular variety: "implied-consent laws that *impose civil penalties and evidentiary consequences on motorists who refuse to comply.*" 136 S. Ct. at 2185 (emphasis added). Such laws are, of course, completely different from the widespread provisions that permit the taking of blood without a warrant. Rather than imposing civil penalties for refusing to comply, these statutes outright deny the motorist the *ability* to refuse.

And it's not at all convincing to claim, like the Colorado court and the plurality in this case, that *Birchfield*'s approval of civil penalties for refusal (as opposed to criminal ones, which it held unconstitutional) means that states imposing only civil penalties for refusal are also free to dispense altogether with the *possibility* of refusal. *Mitchell*, 914 N.W.2d at 160 (App., *infra*,, 15a); *Hyde*; 393 P.3d at 968. In fact, *Birchfield* strongly implies the opposite: if criminal penalties for refusal are unlawful because they too heavily burden the exercise of the Fourth Amendment right to refuse a blood test, can it really be that the state can outright *abolish* the very same right?

But *Birchfield* did more than just imply this conclusion. Addressing North Dakota's argument that blood tests were indispensible law enforcement tools (and thus valid searches incident to arrest) because they, unlike breath tests, could be performed

on unconscious motorists, the Court said: "we have no reason to believe that such situations are common in drunk-driving arrests, *and when they arise, the police may apply for a warrant if need be. Id.* at 2184-85 (emphasis added).

Per the Wisconsin court, and several others, in the very situation *Birchfield* described, there is actually no "need" at all for the police to "apply for a warrant." They can simply rely on legislative declarations that motorists are "deemed" to have consented to warrantless searches, whether they actually consent or not. This holding is irreconcilable with *McNeely* and with *Birchfield*. In declaring that the government may waive the citizen's rights against the government, it drains the constitutional (and indeed, the commonsensical) notion of consent of all meaning. It is wrong, and this Court ought to correct it.

III. The question presented is important, and this case presents an ideal vehicle for deciding it

As Petitioner showed above, the question presented, and closely related questions, have arisen in the courts of about twenty states. Those courts have given directly contradictory answers. For this reason alone, the question is an important one for this Court to address. If it does not, citizens of around half of the states will continue to be subject to statutes allowing the taking of their blood without a warrant, without exigency, and whether they agree or not.

Though petitioner can locate no statistics on the annual number of warrantless, non-consensual blood

draws conducted under implied-consent statutes, the Federal Bureau of Investigation reports there were nearly one million arrests for driving under the influence in 2017. Crime in the United States 2017, Table 29, available at https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/tables/table-29. Given that around thirty states have implied-consent laws permitting warrantless blood draws under some circumstances, it stands to reason that thousands of motorists are subjected to warrantless, non-exigent, factually non-consensual searches every year.

If, as petitioner maintains and many courts have held, such searches are unconstitutional, then these motorists are being subjected, by their courts and legislatures, to systematic Fourth Amendment violations—specifically, warrantless government intrusions into their bodies. The situation merits this court's attention.

And this case is an ideal vehicle to address it. First, the constitutional question was squarely presented in the Supreme Court of Wisconsin (though that court could not find a majority for any holding on it). Its resolution is also dispositive of petitioner's suppression motion: the state has never claimed exigent circumstances as an alternative ground to uphold the blood draw and, in fact, the record reveals no such exigency. The facts and posture of this case thus provide an excellent opportunity to decide whether a state legislature, by means of an implied-consent law, may "deem" a warrantless search lawful under the Fourth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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October 1, 2018

APPENDIX

SUPREME COURT OF WISCONSIN

CASE NO.:	2015AP304-CR
COMPLETE TITLE:	State of Wisconsin, Plaintiff-Respondent, v. Gerald P. Mitchell, Defendant-Appellant.

ON CERTIFICATION FROM THE COURT OF APPEALS

OPINION FILED:	July 3, 2018
SUBMITTED ON BRIEFS:	
ORAL ARGUMENT:	April 11, 2018
SOURCE OF APPEAL:	
COURT:	Circuit
COUNTY:	Sheboygan
JUDGE:	Terence T. Bourke
JUSTICES:	
CONCURRED:	KELLY, J., concurs, joined by R.G. BRADLEY, J. (opinion filed).
DISSENTED:	A.W. BRADLEY, J., dissents, joined by ABRAHAMSON, J. (opinion filed).
NOT PARTICIPATING:	

ATTORNEYS:

For the defendant-appellant, there were briefs filed by *Linda J. Schaefer* and *Schaefer Law Firm, S.C.*, Sturgeon Bay. There was an oral argument by *Linda J. Schaefer*.

For the plaintiff-respondent, there was a brief filed by *Ryan J. Walsh*, chief deputy solicitor general, with whom on the brief were *Brad D. Schimel*, attorney general, and *David H. Perlman*, assistant attorney general. There was an oral argument by *Ryan J. Walsh*, chief deputy solicitor general.

An amicus curiae brief was filed on behalf of Mothers Against Drunk Driving by *Kevin M. St. John* and *Bell Giftos St.*

John, LLC, Madison, with whom on the brief was *Theane D. Evangelis*, *Lauren M. Blas*, and *Gibson, Dunn & Crutcher, LLP*, Los Angeles, California. There was an oral argument by *Lauren M. Blas*.

2018 WI 84

NOTICE

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 2015AP304-CR
(L.C. No. 2013CF365)

STATE OF WISCONSIN : IN SUPREME COURT

State of Wisconsin,

Plaintiff-Respondent,

v.

Gerald P. Mitchell,

Defendant-Appellant.

FILED

JUL 3, 2018

Sheila T. Reiff
Clerk of Supreme Court

Appeal from a judgment of the Circuit Court. *Affirmed.*

¶1 PATIENCE DRAKE ROGGENSACK, C.J. This appeal is before us on certification from the court of appeals.

¶2 Gerald Mitchell was convicted of operating while intoxicated and with a prohibited alcohol concentration, based on the test of blood drawn without a warrant while he was unconscious, pursuant to Wis. Stat. § 343.305(3)(b) (2013-14).[1] Mitchell contends that the blood draw was a search conducted in violation of his Fourth Amendment rights.

[1] All subsequent references to the Wisconsin Statutes are to the 2013-14 version unless otherwise indicated.

¶3 We conclude that Mitchell voluntarily consented to a blood draw by his conduct of driving on Wisconsin's roads and drinking to a point evidencing probable cause of intoxication. Further, through drinking to the point of unconsciousness, Mitchell forfeited all opportunity, including the statutory opportunity under Wis. Stat. § 343.305(4), to withdraw his consent previously given; and therefore, § 343.305(3)(b) applied, which under the totality of circumstances herein presented reasonably permitted drawing Mitchell's blood. Accordingly, we affirm Mitchell's convictions.

I. BACKGROUND

¶4 On the afternoon of May 30, 2013, officers from the City of Sheboygan Police Department were dispatched in response to a report that the caller had seen Mitchell, who appeared intoxicated, get into a gray van and drive away. Between 30 and 45 minutes later, Officer Alex Jaeger made contact with Mitchell. He found Mitchell walking near a beach. Mitchell was wet, shirtless and covered in sand. Mitchell's speech was slurred and he had difficulty maintaining his balance.

¶5 Mitchell admitted to Jaeger that he had been drinking prior to driving and that he continued drinking at the beach. He also stated that he had parked his vehicle "because he felt he was too drunk to drive." Nearby, officers found the gray van Mitchell was reported to have been driving.

¶6 After observing Mitchell's physical condition, Jaeger believed that it would not be safe to conduct standard field sobriety tests. Instead, he administered a preliminary breath

test, which indicated a blood alcohol concentration (BAC) of 0.24.[2] Jaeger then arrested Mitchell for operating while intoxicated.

¶7 Following his arrest, and during the drive to the police station, Mitchell's physical condition deteriorated and his demeanor became more "lethargic." Upon arrival at the police station, it became apparent that an evidentiary breath test would not be feasible. Instead, Jaeger opted to transport Mitchell to a nearby hospital for a blood draw.

¶8 During the approximately eight-minute drive to the hospital, Mitchell "appeared to be completely incapacitated, [and] would not wake up with any type of stimulation." Upon arriving at the hospital, Mitchell needed to be transported in a wheelchair where he sat "slumped over" and unable to maintain an upright seating position.

¶9 After Mitchell entered the hospital emergency room, Jaeger read Mitchell the Informing the Accused form, thereby reading Mitchell the statutory opportunity to withdraw his consent to a blood draw. However, Mitchell was "so incapacitated [that] he could not answer." Jaeger directed hospital staff to draw a sample of Mitchell's blood.[3] They did so. Mitchell did not awaken during the procedure.

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[2] Preliminary breath tests are not sufficient evidence to prove prohibited alcohol concentrations at trial. Wis. Stat. § 343.303.

[3] There was no warrant sought prior to drawing Mitchell's blood.

¶10 The blood draw occurred approximately one hour following Mitchell's arrest. The analysis of his blood sample showed a BAC of 0.222.

¶11 Mitchell was subsequently charged with driving with a prohibited alcohol concentration (PAC), as well as operating a motor vehicle while intoxicated (OWI), as a 7th offense. Prior to trial, Mitchell moved to suppress the results of the blood test. He alleged that the warrantless blood draw violated his rights under the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution.

¶12 In response to Mitchell's motion, the State contended that he had consented to the blood draw when he drove his van on Wisconsin highways according to a subsection of Wisconsin's implied-consent law, Wis. Stat. § 343.305(2). The State also contended that as an unconscious person, he is presumed not to have withdrawn his consent, pursuant to § 343.305(3)(b). The State expressly stated that it was not relying on exigent circumstances to justify the blood draw.

¶13 The circuit court[4] denied Mitchell's suppression motion in reliance on Wis. Stat. § 343.305(3)(b). The circuit court concluded that the officer had probable cause to believe that Mitchell was driving while intoxicated, and therefore, the blood

[4] The Honorable Terence T. Bourke of Sheboygan County presided.

draw was lawful. A jury convicted Mitchell of the OWI and PAC charges.

¶14 Mitchell appealed his conviction based on the sole contention that the warrantless blood draw violated his Fourth Amendment right to be free from "unreasonable searches and seizures."

¶15 The court of appeals, noting the opportunity to clarify the law in light of our recent decision in State v. Howes, 2017 WI 18, 373 Wis. 2d 468, 893 N.W.2d 812,[5] certified the following questions: (1) whether "implied-consent," the potential for which is described in Wis. Stat. §§ 343.305(2) & (3)(a), which arises through a driver's voluntary conduct in operating a vehicle on Wisconsin roadways after drinking to intoxication, is constitutionally sufficient consent, and (2) whether a warrantless blood draw from an unconscious person pursuant to Wis. Stat. § 343.305(3)(b) violates the Fourth Amendment.

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[5] The court of appeals, noting that two of its prior cases had reached opposite conclusions, asked us to clarify whether implied consent is equivalent to constitutionally sufficient consent. Compare State v. Padley, 2014 WI App 65, 354 Wis. 2d 545, 849 N.W.2d 867 (holding that implied consent is not constitutionally sufficient consent), with State v. Wintlend, 2002 WI App 314, 258 Wis. 2d 875, 655 N.W.2d 745 (holding that implied consent is constitutionally sufficient). See also Cook v. Cook, 208 Wis. 2d 166, 171, 560 N.W.2d 246 (1997) (concluding that the court of appeals does not have the power to overrule or modify one of its published opinions).

II. DISCUSSION

A. Standard of Review

¶16 Whether a suppression motion was properly denied presents a question of constitutional fact. Howes, 373 Wis. 2d 468, ¶17 (citing State v. Tullberg, 2014 WI 134, ¶27, 359 Wis. 2d 421, 857 N.W.2d 120). We will not set aside a circuit court's findings of historical fact unless they are clearly erroneous. State v. Brereton, 2013 WI 17, ¶17, 345 Wis. 2d 563, 826 N.W.2d 369. However, the application of those facts to Fourth Amendment principles presents a question of law that we review independently. Id.

B. Fourth Amendment General Principles

¶17 The Fourth Amendment to the United States Constitution, and its Wisconsin counterpart, Article I, Section 11 of the Wisconsin Constitution,[6] protect persons' rights to "be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., amend. IV; Wis. Const. art. I, § 11. "As the text makes clear, the ultimate touchstone of the Fourth Amendment is reasonableness." Riley v. California, 573 U.S. ___, 134 S. Ct. 2473, 2482 (2014) (quoting Brigham City v. Stuart, 547 U.S. 398, 403 (2006)). As a result, the Fourth Amendment does not prohibit all searches undertaken by government actors, but "merely proscribes those

[6] "Historically, we have interpreted Article I, Section 11 of the Wisconsin Constitution in accord with the Supreme Court's interpretation of the Fourth Amendment." State v. Arias, 2008 WI 84, ¶20, 311 Wis. 2d 358, 752 N.W.2d 748.

which are unreasonable." Howes, 373 Wis. 2d 468, ¶21 (quoting Tullberg, 359 Wis. 2d 421, ¶29 (quoting Florida v. Jimeno, 500 U.S. 248, 250 (1991))).

¶18 Drawing blood is a search of the person. Birchfield v. North Dakota, 579 U.S. ___, 136 S. Ct. 2160, 2173 (2016) (stating that "our cases establish that the taking of a blood sample or the administration of a breath test is a search"); Howes, 373 Wis. 2d 468, ¶20 (concluding that a blood draw is a search). Furthermore, a warrantless search is "presumptively unreasonable." State v. Brar, 2017 WI 73, ¶16, 376 Wis. 2d 685, 898 N.W.2d 499 (quoting Tullberg, 359 Wis. 2d 421, ¶30).

¶19 However, "there are certain 'specifically established and well-delineated' exceptions to the Fourth Amendment's warrant requirement." Brar, 376 Wis. 2d 685, ¶16 (quoting State v. Williams, 2002 WI 94, ¶18, 255 Wis. 2d 1, 646 N.W.2d 834). One such exception is a search conducted pursuant to consent. Brar, 376 Wis. 2d 685, ¶16. Warrantless consent searches are reasonable; and therefore, they are consistent with the Fourth Amendment. Fernandez v. California, 571 U.S. 292, 134 S. Ct. 1126, 1137 (2014); Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973).

C. Consent

¶20 In determining whether consent was given, we employ a two-step process. First, we examine whether relevant words, gestures or conduct supports a finding of consent. State v. Artic, 2010 WI 83, ¶30, 327 Wis. 2d 392, 786 N.W.2d 430.

Second, we examine whether the consent was voluntarily given. Id.

1. Implied Consent

¶21 As we have explained, consent to search need not be given verbally. State v. Phillips, 218 Wis. 2d 180, 197, 577 N.W.2d 794 (1998) (citing United States v. Griffin, 530 F.2d 739, 741 (7th Cir. 1976); United States v. Donlon, 909 F.2d 650, 652 (1st Cir. 1990) invalidated on other grounds by United States v. Omar, 104 F.3d 519 (1st Cir. 1997)). Consent given through conduct "provides a sufficient basis on which to find that the defendant consented to the search." Phillips, 218 Wis. 2d at 197 (concluding that defendant's affirmative assistance in the search of his bedroom demonstrated his consent to the search). "Through conduct, an individual may impliedly consent to be searched." Brar, 376 Wis. 2d 685, ¶17.

¶22 In addition, the United States Supreme Court has recently explained that consent also may be shown by the context in which consent arises. Birchfield, 136 S. Ct. at 2185. In Birchfield, the Court said that "[i]t is well established that a search is reasonable when the subject consents, and that sometimes consent to a search need not be express but may be fairly inferred from context." Id. (internal citations omitted). The Court's connection between context and consent was made in the course of Birchfield's review of searches incident to arrest for OWI in states that have implied-consent laws. Birchfield cited two cases that demonstrated constitutionally sufficient consent because of the context in

which consent was lawfully implied: Florida v. Jardines, 569 U.S. 1 (2013) and Marshall v. Barlow's, Inc., 436 U.S. 307 (1978).

¶23 In Jardines, the Court, through Justice Scalia, recognized the sanctity of the home and that at the "very core" of the Fourth Amendment "stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion,'" and that this right extended to the curtilage of the home, including the home's front porch. Jardines, 569 U.S. at 6-7 (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)).

¶24 However, the Supreme Court also said that the sanctity of the curtilage of one's home is not absolute and certain permissions to enter may be implied. Jardines, 569 U.S. at 8. In Jardines, the Court recognized that by putting a knocker on his door, the homeowner had given implicit consent for visitors to approach and said that the implicit granting of such permission "does not require fine-grained legal knowledge." Id. Rather, law enforcement could approach a homeowner's front door "precisely because that is 'no more than any private citizen might do.'" Id. (quoting Kentucky v. King, 563 U.S. 452, 469 (2011)). The Court recognized that a homeowner who places a knocker on his front door impliedly invites visitors to approach and enter upon the home's curtilage. Jardines, 569 U.S. at 8. Stated otherwise, in the context established by the homeowner, consent to enter the curtilage and approach the front door was given.

¶25 The other decision referenced in Birchfield, Marshall v. Barlow's, Inc., noted that while generally the Fourth Amendment prohibits searches without a warrant, certain businesses and industries are subject to exception. Marshall, 436 U.S. at 313. Indeed, "pervasively regulated business[es]" and "'closely regulated' industries 'long subject to close supervision and inspection,'" are subject to warrant exceptions for certain searches. Id. (quoting Colonnade Catering Corp. v. United States, 397 U.S. 72, 73-75, 77 (1970) (wherein the Court held that the statutory right to enter and inspect a facility authorized to serve liquor required no warrant for the search)).

¶26 The Fourth Amendment exception upheld in Colonnade was grounded in "unique circumstances" in that "[c]ertain industries have such a history of government oversight that no reasonable expectation of privacy, could exist for a proprietor over the stock of such an enterprise." Marshall, 436 U.S. at 313 (internal citation omitted). Referring to the liquor and firearms industries, the Court said that "when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation." Id. According to the Court, businesses in these industries are part of "a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware." Id. By choosing to participate in certain businesses, the Court concluded that those persons had "accept[ed] the burdens as well as the benefits of their trade," in a manner different from other businesses and thus "in effect

consents to the restrictions placed upon him." Id. Once again, it was the context in which such businesses are operated that evidenced voluntary consent to be subjected to significant governmental regulation. Stated otherwise, the context in which one operates a business involved in alcohol or firearms had a well-known history of significant governmental regulation such that an owner of such a business would have no reasonable expectation of privacy from governmental oversight of his business. Id.

¶27 Birchfield's discussion of the relationship between context and consent instructs that context is part of the totality of circumstances that courts should review when consent to search is at issue. In regard to the context of highway regulation, we note that the statutes at issue here are the legislature's attempt to stop the injuries and deaths drunken drivers inflict year after year on others who use Wisconsin highways.[7] That drunken driving has resulted in and necessarily increased state regulation of the privilege of driving on public roadways is well known. Therefore, the context of well-publicized regulations forms part of the totality of circumstances we examine to determine whether a driver who has been arrested for OWI consented to be searched.

[7] The same is true across the nation. For example, it has been reported that in 2016 drunken driving took one life every 50 minutes in the United States. See National Highway Traffic Safety Administration, Drunk Driving, https://www.nhtsa.gov/risky-driving/drunk-driving (last visited June 25, 2018).

¶28 Some of the regulations to which drivers consent have never been challenged. For example, they agree to drive on the right side of the road, Wis. Stat. § 346.05; to yield the right-of-way to emergency vehicles, Wis. Stat. § 346.19; to comply with posted speed limits, Wis. Stat. § 346.57(4); and not to drive with a prohibited blood alcohol concentration, Wis. Stat. § 346.63(1)(b). While these regulations do not have implications for constitutional rights, drivers do not sign a form acknowledging these obligations each time they get into their vehicle; yet, they are held accountable and required to abide by each of them because they chose to drive a vehicle upon public highways.

¶29 Just as Wisconsin drivers consent to the above-listed obligations by their conduct of driving on Wisconsin's roads, in the context of significant, well-publicized laws designed to curb drunken driving, they also consent to an evidentiary drawing of blood upon a showing of probable cause to believe that they operated vehicles while intoxicated.[8] This qualified consent to search is required in order to exercise the privilege of driving in Wisconsin.[9] As Birchfield explained, implied consent laws condition "the privilege of driving on state roads

[8] Of course, probable cause to believe that a driver is operating while intoxicated is sufficient to arrest the driver.

[9] Probable cause to believe that a driver operated a vehicle while intoxicated is required before the driver must provide samples of breath, blood or urine. Wis. Stat. §§ 343.305(2) & (3)(a).

and [] the privilege would be rescinded if a suspected drunk driver refused to honor that condition." Birchfield, 136 S. Ct. at 2169. Consent is complete at the moment the driver begins to operate a vehicle upon Wisconsin roadways if the driver evidences probable cause to believe that he or she is operating a vehicle while intoxicated. Wis. Stat. §§ 343.305(2) & (3)(a).[10]

¶30 As acknowledged by the United States Supreme Court, driving on state highways is a privilege; it is not a right. Id. In Wisconsin, it is a statutory privilege that comes with

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[10] The point in time when a driver consents has been described in various ways based on the facts of the case and the arguments of counsel. For example, in Wintlend, 258 Wis. 2d 875, the court of appeals addressed Wintlend's argument that the officer's reading the Informing the Accused form to him coerced consent. Id., ¶8. The court rejected his argument and concluded that the statutory terms chosen by the legislature demonstrated that consent had been given before Wintlend was read the Informing the Accused form. Id., ¶16.

In State v. Neitzel, 95 Wis. 2d 191, 289 N.W.2d 828 (1980), Neitzel's license was suspended for 60 days for his unreasonable refusal to permit chemical testing. Id. at 192. Neitzel argued that the refusal was not unreasonable because he had asked to consult his attorney before deciding and his request was denied. Id. at 193. In dismissing Neitzel's argument, we said that under the circumstances no right to counsel was provided. Id. We also explained that a driver must be arrested before he or she could be asked to submit to chemical testing, but custody at that point did not implicate a right to counsel. Id. at 200. Because the focus in Neitzel was on an alleged right to counsel, our discussion addressed that concern. However, our discussion herein explains why constitutionally sufficient consent occurs when a driver operates a vehicle on Wisconsin's highways and drinks or uses drugs to a point where the driver exhibits probable cause that he or she is intoxicated.

statutory obligations when that privilege is exercised. Steeno v. State, 85 Wis. 2d 663, 671, 271 N.W.2d 396 (1978) ("The granting of an automobile license to operate a motor vehicle is a privilege and not an inherent right.").

¶31 The United States Supreme Court recognized that implied consent laws are the context in which constitutionally sufficient consent for chemical testing may be given when it opined, "our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. . . . [N]othing we say here should be read to cast doubt on them." Birchfield, 136 S. Ct. at 2185.

¶32 Birchfield also established a "categorical" rule that a breath test does not implicate "significant privacy concerns," and therefore, a warrant is not needed to administer a breath test. Birchfield, 136 S. Ct. at 2176-84. This is an interesting conclusion because of the Court's previous statements that there are no bright-line rules for determining when a warrant is not required. See Missouri v. McNeely, 569 U.S. 141, 158 (2013). It is also interesting because a driver's bodily alcohol concentration can be determined from evidentiary breath tests as well as from blood tests.

¶33 Birchfield went on to explain, "It is another matter, however, for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test. There must be a limit to the consequences to which motorists may be deemed to have consented

by virtue of a decision to drive on public roads." Birchfield, 136 S. Ct. at 2185 (emphasis added). The limit on the consequences of the decision to drive while intoxicated was the imposition of criminal penalties for refusing to permit a blood draw. Id.

¶34 Criminal penalties for withdrawing consent to a blood draw were beyond the scope of implied-consent laws because there was an insufficient nexus between the consequence of criminal penalties and choosing to drive on the highways in those states that imposed criminal penalties for withdrawing consent to provide a blood sample for testing. Id. at 2186. In Wisconsin, the consequences of refusing to permit a blood draw are civil and evidentiary, not criminal. Wis. Stat. § 343.305(4).

¶35 Relevant to assessing future challenges to refusal to submit to a blood draw, the Supreme Court adopted the following standard: motorists are "deemed to have consented to only those conditions that are 'reasonable' in that they have a 'nexus' to the privilege of driving and entail penalties that are proportional to severity of the violation." Id. When applying that standard, the Court concluded that "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense [for refusing to submit]." Id. However, imposing "civil penalties and evidentiary consequences" on motorists who refuse to submit to a blood draw are permissible because civil penalties, such as license revocation, have a nexus to driving. Id. at 2185 (citing McNeely, 569 U.S. at 160-61).

¶36 Wisconsin imposes no criminal penalties for withdrawing consent previously given. The only criminal consequence imposed for drunken driving in Wisconsin arises from repeated OWI and PAC convictions and from convictions for causing injury or death by intoxicated use of a vehicle. See generally Wis. Stat. § 346.65. Criminal penalties do not arise from withdrawing consent to blood draws. Wis. Stat. § 343.305(4). All penalties for refusal are administrative and evidentiary. For example, a refusal that leads to a first OWI conviction subjects a defendant to a license suspension and a forfeiture but no jail time. Wis. Stat. §§ 343.305(4) & 346.65(1)(a).

¶37 Accordingly, we confirm that because it is constitutionally permissible to impose civil penalties as a consequence for refusing to submit to a blood draw, as Wis. Stat. § 343.305(4) provides, Wisconsin's implied-consent statutes, §§ 343.305(2) & (3)(a), describe a context consistent with Birchfield where constitutionally sufficient consent to search arises through conduct. Birchfield, 136 S. Ct. at 2185. Stated otherwise, it is not statutes that grant consent to search, but rather, consent is granted by the driver's exercising the privilege of driving on Wisconsin highways when he or she has imbibed sufficient alcohol or drugs to become intoxicated. Furthermore, if the consent that arises when a driver's conduct falls within §§ 343.305(2) & (3)(a) were not constitutionally sufficient consent for a blood draw, there

would be no reason to provide a statutory opportunity to withdraw consent under § 343.305(4).

¶38 Furthermore, we presume that drivers know the laws applicable to the roadways on which they drive. State v. Weber, 2016 WI 96, ¶78, 372 Wis. 2d 202, 887 N.W.2d 554 (Kelly, J., concurring). Likewise, we also recognize, as has the United States Supreme Court, that in a state with civil penalties for refusal to submit to a blood draw, "a person suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test." South Dakota v. Neville, 459 U.S. 553, 560 n.10 (1983).

¶39 In Neville, the Supreme Court examined whether Neville's refusal to submit to a blood-alcohol test could be used as evidence of guilt for drunken driving at his trial. The circuit court of South Dakota had suppressed Neville's refusal to submit to a blood-alcohol test based on the circuit court's conclusion that evidence of refusal violated Neville's federal constitutional rights. Id. at 556. The Supreme Court reversed the suppression because Neville's "right to refuse the blood-alcohol test [] is simply a matter of grace bestowed by the South Dakota legislature," not a constitutional right. Id. at 565. As the Court further explained, because a driver had no constitutional right to refuse a blood-draw when there was probable cause to arrest for OWI, the driver's refusal could be used against him at trial as evidence of guilt. Id.; see also Howes, 373 Wis. 2d 468, ¶62 (Gableman, J., concurring) ("[A]

driver has no statutory or constitutional right to refuse [blood alcohol testing] without consequences.").[11]

¶40 Of course, consent voluntarily-given before a blood draw may be withdrawn with or without a statutory reminder. United States v. Sanders, 424 F.3d 768, 774 (8th Cir. 2005). However, when consent is withdrawn, civil consequences may follow because the opportunity to withdraw voluntarily given consent is not of constitutional significance. Neville, 459 U.S. at 565; Wis. Stat. § 343.305(4).

¶41 The legitimacy of implied-consent laws has been supported repeatedly by the United States Supreme Court. In McNeely, the Court stated that "[n]o one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." McNeely, 569 U.S. at 160 (quoting Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 451 (1990)). The Court further recognized that "drunk driving continues to exact a terrible toll on our society," and that "all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to

[11] Justices Shirley Abrahamson, Ann Walsh Bradley, Rebecca Grassl Bradley and Daniel Kelly manufacture a constitutional right to refuse blood-draws to test for blood-alcohol content of drivers who operate vehicles while intoxicated, notwithstanding the United States Supreme Court's clearly stated explanation in South Dakota v. Neville, 459 U.S. 553, 560 n.10, 565 (1983), that drunken drivers have no constitutional right to refuse blood-alcohol testing. State v. Dalton, 2018 WI 85, ¶61, 383 Wis. 2d 147, 914 N.W.2d 120 (manufacturing a constitutional right for drunken drivers to refuse blood-alcohol testing).

consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense." McNeely, 569 U.S. at 160-61.

¶42 Other states are in accord with our conclusion that drivers give constitutionally sufficient consent through driving on state highways and drinking to a point evidencing probable cause of intoxication. For example, the Supreme Court of Colorado held that warrants need not be obtained for unconscious drivers as the result of their previously-given consent under Colorado's "Expressed Consent Statute." People v. Hyde, 393 P.3d 962 (Colo. 2017). The Colorado court recognized that "Hyde's statutory consent satisfied the consent exception to the Fourth Amendment warrant requirement." Id., ¶3. Similarly, the Supreme Court of Kentucky has said that drivers "consent[] to testing by operating a vehicle in Kentucky." Helton v. Commonwealth, 299 S.W.3d 555, 559 (Ky. 2009).

¶43 As judicial opinions of other states, as well as the United States Supreme Court's prior statements show, "[i]mplied consent is not a second-tier form of consent." Brar, 376 Wis. 2d 685, ¶23. Rather, when a driver chooses to operate a vehicle upon Wisconsin's roads, he or she does so charged with knowing the laws of this state. See Byrne v. State, 12 Wis. 577 (*519), 580 (*521) (1860).

¶44 Those laws include Wis. Stat. §§ 343.305(2) & (3)(a) that function together. Section 343.305(2) provides that anyone who "drives or operates a motor vehicle upon the public highways of this state . . . is deemed to have given consent to one or

more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of [alcohol or other prohibited substances], when requested to do so by a law enforcement officer." Section 343.305(3)(a) applies when a driver is arrested based on probable cause to believe that he or she is intoxicated, wherein a driver's conduct completes his or her obligation to give samples of breath, blood or urine.

¶45 In the case before us, Mitchell chose to avail himself of the privilege of driving upon Wisconsin's roads. Because he did so while intoxicated, by his conduct he consented to the effect of laws that are relevant to exercising that privilege. He did not need to read them off one-by-one, and then sign a piece of paper acknowledging his consent to be subject to those rules and penalties for failing to follow them. By driving in Wisconsin, Mitchell consented to have samples of his breath, blood or urine taken upon the request of a law enforcement officer who had probable cause to believe he was intoxicated, unless he withdrew such consent. Wis. Stat. §§ 343.305(2) and (3)(a).

2. Voluntary Consent

¶46 A determination that consent has been given is not the end of our inquiry, we also must determine whether the consent was given "freely and voluntarily." Artic, 327 Wis. 2d 392, ¶32. "However, the State need not demonstrate that consent was given knowingly or intelligently." Brar, 376 Wis. 2d 685, ¶26 (citing Schneckloth, 412 U.S. at 241 ("Nothing, either in the

purposes behind requiring a 'knowing' and 'intelligent' waiver of trial rights, or in the practical application of such a requirement suggests that it ought to be extended to the constitutional guarantee against unreasonable searches and seizures.")). The concept of "'voluntariness' reflects an accommodation of complex, somewhat conflicting values." Artic, 327 Wis. 2d 392, ¶32 (citing Schneckloth, 412 U.S. at 224-25).

¶47 "The test for voluntariness is whether consent to search was given in the absence of duress or coercion, either express or implied." Phillips, 218 Wis. 2d at 197. In evaluating the voluntariness of consent, we evaluate "the totality of all the surrounding circumstances." Artic, 327 Wis. 2d 392, ¶32 (quoting Schneckloth, 412 U.S. at 226). No single criterion controls voluntariness. Phillips, 218 Wis. 2d at 197.

¶48 In making a determination of voluntariness, the State bears the burden to prove by clear and convincing evidence that consent was given voluntarily. Id. Our determination of the voluntariness of consent is a mixed question of fact and law. Id. In addition, voluntariness is a determination that we consider relative to Wis. Stat. §§ 343.305(2) & (3)(a) when a driver commences operation of his or her vehicle on Wisconsin roadways and under § 343.305(3)(b) when an unconscious driver has not availed himself of an opportunity to withdraw consent previously given.

¶49 Consent to search that arises in the context of Wisconsin's implied-consent laws is voluntary in one respect

that is similar to the voluntariness of consent in Colonnade because Wisconsin has a long history of close governmental regulation of its highways in regard to drunken drivers. Stated otherwise, the privilege of driving on Wisconsin highways comes within the context of well-publicized requirements to provide samples of breath, blood or urine to law enforcement who have probable cause to believe that the driver is intoxicated.

¶50 We now further consider voluntary consent under four subsections of Wisconsin's implied-consent law at issue in the case before us: Wis. Stat. §§ 343.305(2), 343.305(3)(a), 343.305(4) and 343.305(3)(b).[12]

a. Wisconsin Stat. §§ 343.305(2) & (3)(a)

¶51 The voluntariness of consent by conduct that occurs when a driver commences operation of his vehicle on Wisconsin roadways is unequivocal and constitutionally sufficient when he or she evidences the indicia of intoxication such that there is probable cause to believe he or she is driving under the influence. Stated otherwise, voluntary consent arises through the effect of a driver's conduct in the context of Wisconsin law, Wis. Stat. §§ 343.305(2) and 343.305(3)(a).

[12] We note that other circumstances are impacted by Wisconsin implied consent law that we do not discuss here. See Wis. Stat. § 343.305(3)(ar)2., causing death or great bodily harm when there is reason to believe the driver violated state or local traffic law. Here, we limit our discussion to those circumstances where there are no facts in addition to probable cause to believe the driver was intoxicated.

¶52 Wisconsin Stat. § 343.305(2) clearly provides, "[a]ny person who . . . drives or operates a motor vehicle upon the public highways of this state . . . is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol, controlled substances . . . ." A driver's consent is conditioned on probable cause to believe he or she is intoxicated or has caused serious injury or death. As Wis. Stat. § 343.305(3)(a) provides, "Upon arrest of a person for violation of s. 346.63(1) [driving while intoxicated], (2m) [underage drinking], or (5) [commercial driver] or . . . (2) [causing injury] . . . a law enforcement officer may request the person to provide one or more samples of his or her breath, blood or urine." Therefore, as an initial matter, one consents to search by driving on Wisconsin roadways when one has imbibed sufficient alcohol to support probable cause to arrest. The choice to drive on Wisconsin roadways and the choice to drink or ingest drugs to the point of probable cause to arrest for OWI are voluntary choices.

b. Wisconsin Stat. § 343.305(4)

¶53 Wisconsin Stat. § 343.305(4) provides a statutory opportunity to withdraw consent given under §§ 343.305(2) and (3)(a), when an officer has probable cause to arrest the driver. However, civil penalties may follow when consent is withdrawn. Section 343.305(4) provides in relevant part:

> You have either been arrested for an offense that involves driving or operating a motor vehicle while under the influence of alcohol or drugs . . . or you are the operator of a vehicle that was involved in an accident that caused the death of, great bodily harm to, or substantial bodily harm to a person . . . .
>
> This law enforcement agency now wants to test one or more samples of your breath, blood or urine to determine the concentration of alcohol or drugs in your system. . . . If you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties. The test results or the fact that you refused testing can be used against you in court.[13]

It is helpful to keep subsection (4) in mind when discussing Wis. Stat. § 343.305(3)(b), which is central to this appeal.

¶54 Wisconsin Stat. § 343.305(4) provides a statutory opportunity to withdraw consent, even though a driver has operated a vehicle on Wisconsin roads and has imbibed sufficient alcohol to be arrested for OWI. Of course, one may withdraw consent previously given with or without a statutory reminder. See Sanders, 424 F.3d at 774. Nevertheless, a driver may

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[13] Justices Shirley Abrahamson, Ann Walsh Bradley, Rebecca Grassl Bradley and Daniel Kelly strike down, sub silentio, Wis. Stat. § 343.305(4)'s provision that the fact of refusal can be used against a drunken driver in court because they label refusal of chemical testing a constitutional right. Dalton, 383 Wis. 2d 147, ¶61. However, the United States Supreme Court has concluded that refusing to take a blood test is not of constitutional significance and can be used against the defendant at trial. Neville, 459 U.S. at 565. The majority opinion in Dalton and the separate writings in this case will create confusion in Wisconsin courts on the admissibility of refusal evidence because Neville has not been overruled and remains authoritative on whether refusal is or is not a constitutional right.

forfeit the driver's opportunity to withdraw consent by failing to timely engage it. State v. Ndina, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612. Furthermore, a defendant may forfeit an opportunity he or she otherwise would have by his or her conduct. State v. Anthony, 2015 WI 20, ¶59, 361 Wis. 2d 116, 860 N.W.2d 10.

¶55 Here, Mitchell drank sufficient alcohol to render himself unconscious. He had a BAC of 0.222. It is no wonder that he passed out.[14] Through this conduct, he forfeited all opportunity to withdraw the consent to search that he had given.

c. Wisconsin Stat. § 343.305(3)(b)

¶56 Mitchell was unconscious when his blood was drawn. Wisconsin Stat. § 343.305(3)(b) addresses blood draws from unconscious persons who have not availed themselves of the statutory opportunity that is provided by § 343.305(4) or otherwise taken steps to withdraw consent. Some who are unconscious have imbibed sufficient alcohol or drugs to render themselves unconscious; others may be unconscious due to an injury sustained in an accident. Section 343.305(3)(b) provides in relevant part:

> A person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subsection, and if a law enforcement officer has probable cause to believe that

[14] See National Institute on Alcohol Abuse and Alcoholism, Alcohol Overdose: The Dangers of Drinking Too Much, https://pubs.niaaa.nih.gov/publications/AlcoholOverdoseFactsheet/Overdosefact.htm (Oct. 2015).

> the person has violated s. 346.63(1) [driving while intoxicated], (2m) [underage drinking] or (5) [commercial driver] . . . [or caused injury] one or more samples specified in par. (a) or (am) may be administered to the person.

¶57 The Fourth Amendment question is whether drawing Mitchell's blood while he was unconscious was unreasonable and therefore in violation of Fourth Amendment's prohibitions against unreasonable searches. Mitchell claims the blood draw was unreasonable because he was unconscious when the Informing the Accused form was read to him. The State claims that the blood draw was reasonable because Jaeger had arrested Mitchell for driving while intoxicated.[15]

¶58 Mitchell's self-induced physical condition does not render Wis. Stat. § 343.305(3)(b)'s presumption unreasonable under the totality of circumstances applicable to our Fourth

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[15] The State's contention could be read to assert that the blood draw was a search incident to arrest within the traditional exception to the Fourth Amendment's warrant requirement.

Mitchell's blood draw parallels the search incident to arrest doctrine, as probable cause to arrest Mitchell for driving while intoxicated is fully supported by the record. That a search incident to arrest is an exception to the warrant requirement is an important principle to keep in mind. This is so because all unconscious drivers are not subjected to a blood draw under Wisconsin implied consent laws. Only those drivers for whom "a law enforcement officer has probable cause to believe that the person has violated [laws regulating use of intoxicants]" can be searched. Wis. Stat. § 343.305(3)(b). This limitation also is consistent with the reasonableness requirement of the Fourth Amendment. For an unconscious driver, a blood draw is the only means by which to obtain evidence of the crime for which he or she has been charged.

Amendment discussion. First, by exercising the privilege of driving on Wisconsin highways, Mitchell's conduct demonstrated consent to provide breath, blood or urine samples to be tested in accord with §§ 343.305(2) & (3)(a) if law enforcement had probable cause to believe that he had operated his vehicle while intoxicated. Second, Jaeger had probable cause to arrest Mitchell for driving while intoxicated. His speech was slurred; he smelled of alcohol; he had difficulty maintaining his balance; his preliminary breath test showed a BAC of 0.24, which indicates significant intoxication. Third, Mitchell chose to drink sufficient alcohol to produce unconsciousness. Fourth, by his conduct, Mitchell forfeited the statutory opportunity to assert that he had "withdrawn consent" he previously gave. Ndina, 315 Wis. 2d 653, ¶29; Anthony, 361 Wis. 2d 116, ¶59.

¶59 Therefore, under the totality of circumstances as applied to Mitchell, Wis. Stat. § 343.305(3)(b)'s presumption is reasonable. Accordingly, drawing Mitchell's blood was reasonable, and no Fourth Amendment violation occurred.

¶60 Because we conclude that consent given by drivers whose conduct falls within the parameters of Wis. Stat. § 343.305 is constitutionally sufficient consent to withstand Fourth Amendment scrutiny, and although consent must be voluntary, it need not be knowing, we overrule State v. Padley, 2014 WI App 65, 354 Wis. 2d 545, 849 N.W.2d 867. We do so for two reasons. First, we clarify that Padley has no precedential effect because its holding is in direct conflict with an earlier, published court of appeals decision, State v. Wintlend,

2002 WI App 314, 258 Wis. 2d 875, 655 N.W.2d 745. Cook v. Cook, 208 Wis. 2d 166, 171, 560 N.W.2d 246 (1997) (concluding that the court of appeals cannot overrule or modify one of its published opinions). Second, Padley is simply wrong as a matter of law. There, the court of appeals said that "implied consent" is different than "actual consent," and that actual consent is given only when a driver affirms his or her previously-given implied consent after being read the Informing the Accused form. See Padley, 354 Wis. 2d 545, ¶38. The court also incorporated the concept of "knowingly" into consent law. Id., ¶62. Under the reasoning in Padley, driving on Wisconsin highways and drinking, using drugs or being involved in an accident causing death or serious bodily injury while violating a state or local traffic law does not provide constitutionally sufficient consent through conduct. We conclude otherwise.

¶61 The question that remains in regard to Mitchell is whether Wis. Stat. § 343.304(3)(b)'s presumption that consent has not been withdrawn is reasonable for a driver who has suffered an injury rendering him or her unconscious, but for whom there is probable cause to believe that he or she operated a vehicle in violation of laws regulating the use of intoxicants.

¶62 We begin by noting that all drivers, by their conduct, consent to provide samples of their breath, blood or urine when requested by law enforcement personnel who have probable cause to arrest for driving while intoxicated. Wis. Stat. §§ 343.305(2) & (3)(a). We also recognize that consent to

search once given may be withdrawn. See Sanders, 424 F.3d at 774. Although no magic words are required to withdraw consent, the intent to withdraw must be unequivocal. Id. Withdrawal of consent given under implied-consent laws also may be withdrawn. Wisconsin Stat. § 343.305(4) reminds drivers of the opportunity to "withdraw" consent previously given. See also State v. Arrotta, 339 P.3d 1177, 1178 (Idaho 2014) (concluding that under Idaho implied-consent laws, a suspected drunken driver can withdraw his or her consent to test for the presence of alcohol). However, for many unconscious drivers, it may be that they have taken no steps to demonstrate unequivocal intent to withdraw consent previously given.

¶63 Furthermore, the opportunity to refuse a blood test when there is probable cause to believe the driver is intoxicated is not of constitutional significance, as is shown by Supreme Court jurisprudence concluding that withdrawal of consent may be used as evidence of guilt at trial. State v. Crandall, 133 Wis. 2d 251, 255, 394 N.W.2d 905 (1986) (citing Neville, 459 U.S. at 565 (concluding that it is not "fundamentally unfair for South Dakota to use the refusal to take the test as evidence of guilt, even though respondent was not specifically warned that his refusal could be used against him at trial")).

¶64 In addition, Wis. Stat. § 343.305(3)(b)'s presumption affects only unconscious drivers for whom law enforcement has probable cause to believe that the driver has violated statutory proscriptions on use of intoxicants. Therefore, those drivers

who are unconscious but for whom law enforcement does not have probable cause to believe they drove while intoxicated will not be subject to the presumption of § 343.305(3)(b).

¶65 For drivers for whom the presumption applies, Wis. Stat. § 343.305(3)(b) is consistent with United States Supreme Court precedent that a warrantless search at arrest does not violate the Fourth Amendment when there is consent given prior to the search. United States v. Robinson, 414 U.S. 218, 224 (1973); Schneckloth, 412 U.S. at 222. Therefore, we conclude that under the totality of circumstances the presumption of § 343.305(3)(b) is reasonable. Accordingly, it does not violate Fourth Amendment rights of one for whom law enforcement has probable cause to believe he or she operated a vehicle after consuming alcohol or drugs to the point of intoxication.

III. CONCLUSION

¶66 We conclude that Mitchell voluntarily consented to a blood draw by his conduct of driving on Wisconsin's roads and drinking to a point evidencing probable cause of intoxication. Further, through drinking to the point of unconsciousness, Mitchell forfeited all opportunity, including the statutory opportunity under Wis. Stat. § 343.305(4), to withdraw his consent previously given; and therefore, § 343.305(3)(b) applied, which under the totality of circumstances reasonably permitted drawing Mitchell's blood. Accordingly, we affirm Mitchell's convictions.

By the Court.—The judgment of the circuit court is affirmed.

¶67 DANIEL KELLY, J. *(concurring)*. I do not believe the state can waive the people's constitutional protections against the state. I nonetheless concur because performing a blood draw on an unconscious individual who has been arrested for operating a motor vehicle while intoxicated in violation of Wis. Stat. § 346.63 ("OWI") is reasonable within the meaning of the Fourth Amendment to the United States Constitution.[1]

¶68 This is not the first time we have considered whether a law enforcement officer may perform a blood draw on an individual pursuant to "consent" granted by Wis. Stat. § 343.305. Last term we considered whether such "implied consent" can satisfy the requirements of the Fourth Amendment to the United States Constitution. See State v. Brar, 2017 WI 73, ¶¶15, 28-29, 376 Wis. 2d 685, 898 N.W.2d 99 (lead opinion). No opinion attracted a majority of the court. I concurred because Mr. Brar was conscious and had provided express consent to a blood draw, a point on which a majority of the court agreed. However, because the court nonetheless addressed the constitutionality of the implied consent statute, I also explained why I believe that "implied consent" is actually consent granted by the legislature, not the suspect, and why legislative consent cannot satisfy the mandates of our State and Federal Constitutions. See id., ¶¶44, 59 (Kelly, J., concurring); see also id., ¶15 & n.6 (lead opinion) (discussing

[1] I join paragraphs 1-2 and 4-28 of the lead opinion.

federal and state constitutional provisions). I incorporate that analysis here in toto.

¶69 The court today is even more ambitious than it was in Brar. Legislatively-granted consent to perform a blood draw is justified, the court says, for the same reasons certain searches of pervasively-regulated businesses do not require warrants. Lead op., ¶¶25-28 (citing Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970)). But the court misunderstands the significance of that line of cases. The searches considered there were not reasonable because a legislature said they were; they were reasonable because they did not intrude on the affected person's reasonable expectation of privacy. In Colonnade Catering, for example, the United States Supreme Court surveyed the regulatory history of the liquor industry, reaching as far back as England of the eighteenth century. Colonnade Catering, 397 U.S. at 75. The whole point of rehearsing that history was to demonstrate that a liquor retailer had no reasonable expectation his premises would be free from regular governmental inspection. See id. Therefore, the congressionally-developed inspection regime at issue in Colonnade Catering was constitutional because it operated in an area in which the retailer had no reasonable expectation of privacy. The United States Supreme Court has treated the firearm industry in a similar fashion. In United States v. Biswell, 406 U.S. 311 (1972), the Court said "[i]t is also apparent that if the law is to be properly enforced and inspection made effective, inspections without warrant must be

deemed reasonable official conduct under the Fourth Amendment." Id. at 316. Although the Court chose a stilted means of explaining itself, it is apparent the Court had concluded that the inspection regime in that case did not reach into an area in which the pawn dealer had a reasonable expectation of privacy. See id. The "pervasive-regulation" doctrine, therefore, allows warrantless inspection regimes only when the nature of the business at issue is such that the proprietor does not have an expectation of privacy.

¶70 The court should not venture into the "pervasive-regulation" arm of Fourth Amendment jurisprudence without a great deal of fear and trepidation. The rationale justifying this doctrine is too easy to abuse. If increased regulation decreases the areas in which individuals have a reasonable expectation of privacy, then the Fourth Amendment's protections are effectively contingent on the reach of the regulatory state. Through combined legislative and executive activity, oceans of regulations can wear away zones of privacy, allowing warrantless inspection regimes to follow in their wake.

¶71 Today's decision is a good example of the doctrine's erosive power. Driving, the court observes, is subject to many regulations, what with all the rules about staying on the right side of the road, speed limits, interactions with emergency vehicles, et cetera. The court could have mined that vein even more deeply than it did—under any definition, driving truly is pervasively regulated. The temptation to reach for the doctrine under these circumstances is nearly irresistible. And why

wouldn't it be? It fairly demands to be heard here. But this is a powerful and unruly force, and when the United States Supreme Court set it in motion, it impressed on the doctrine no internal logic capable of limiting its reach.

¶72 The court thinks to wield this doctrine here with limited effect—after all, we are simply justifying a warrantless blood draw. But the court misapprehends how the doctrine functions and, therefore, its consequences. If we are of a mind that this doctrine justifies the implied consent law, we may do so only if we first conclude that regulatory pervasiveness has removed the subject of its operation from the reasonable expectation of privacy. See Colonnade Catering, 397 U.S. at 75; Biswell, 406 U.S. at 316. That is to say, because driving is pervasively regulated, those who travel on Wisconsin's highways have no reasonable expectation of privacy as they engage in that activity. And if that is true, it would sweep away a large body of Fourth Amendment jurisprudence as it relates to traffic stops, searches of automobiles, searches of drivers and passengers, et cetera. Wielding this doctrine as the court does today, if we are serious about its application, calves off a substantial piece of the Fourth Amendment.

¶73 For these reasons, and the reasons I discussed in my Brar concurrence, I conclude that the consent implied by Wis. Stat. § 343.305 cannot justify the blood draw performed on Mr. Mitchell.

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¶74 But this case is not Brar, and different reasons justify the blood draw here. The most important distinction between the two cases is this: Mr. Mitchell was not conscious when the law enforcement officer determined that a blood draw was necessary. No Supreme Court decision has yet opined directly on whether a warrant is necessary to perform a blood draw under these circumstances; I believe the interplay among Schmerber v. California, 384 U.S. 757 (1966), Missouri v. McNeely, 569 U.S. 141 (2013), and Birchfield v. North Dakota, 136 S. Ct. 2160 (2016), leave that question open. Their combined rationale, however, indicates that no warrant is necessary to perform a blood draw when an individual has been arrested for OWI, the suspect is unconscious, and there is a risk of losing critical evidence through the human body's natural metabolization of alcohol.

¶75 For more than half a century now the United States Supreme Court has recognized that warrantless blood draws can be constitutional. In Schmerber, the Supreme Court recognized that exigent circumstances can justify a warrantless blood draw from an individual arrested on OWI charges. See Schmerber, 384 U.S. at 770-71. It said the human body's natural metabolization of alcohol could, under the right circumstances, cause an officer to "reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'" Id. at 770 (citation omitted).

¶76 More recently, the State of Missouri pressed the Supreme Court to adopt a rule that the natural metabolization of alcohol in the bloodstream presents a per se exigency. McNeely, 569 U.S. at 151-52. The Court refused, but confirmed the continuing vitality of the rule that the proper circumstances will still justify a warrantless blood draw. "We do not doubt," the Court said, "that some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test." Id. at 153. Therefore, "[w]hether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." Id. at 156.

¶77 The constitutionality of a warrantless blood draw returned to the Supreme Court in the context of the "search incident to arrest" doctrine in Birchfield. 136 S. Ct. at 2179, 2185. There, the Court said this doctrine justifies a warrantless breath test when the individual has been arrested for OWI; however, it does not justify a warrantless blood draw (at least when the suspect is conscious). See id. at 2185. In reaching this conclusion, the Court placed heavy emphasis on the differing levels of intrusiveness between the two tests. Id. at 2178. Thus, for example, it said that "[b]ecause breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, we conclude that a breath test, but not a blood test, may be administered as a

search incident to a lawful arrest for drunk driving." Id. at 2185.

¶78 Availability of the breath test, however, was the driving motivation for its ruling. In the absence of such an option, the reasonableness of a warrantless blood test increases:

> We reach a different conclusion with respect to blood tests. Blood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test. Respondents have offered no satisfactory justification for demanding the more intrusive alternative without a warrant.

Id. at 2184.

¶79 Combining the reasoning of Schmerber, McNeely, and Birchfield provides the necessary guidance for Mr. Mitchell's case. Schmerber established the ground-rule principle that a warrantless blood draw can be constitutional. See Schmerber, 384 U.S. at 770-71. McNeely refined the Schmerber holding when it explained that, under the right circumstances, "the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test." See McNeely, 569 U.S. at 153. Birchfield added two important pieces to the analysis. First, it established that an individual arrested for OWI may be searched incident to his arrest for evidence of intoxication without a warrant. See Birchfield, 136 S. Ct. at 2184. And second, it determined that the method by which law enforcement conducts the search (by breath test as opposed to blood test) depends on the availability of the less-intrusive option. See id. at 2185.

¶80 Here is how the Supreme Court's instructions apply in this case. Mr. Mitchell, of course, was arrested for OWI, so Schmerber and McNeely recognize that critical evidence of his intoxication was continually metabolizing away. They also explain that although metabolization alone would not support a warrantless blood draw, when combined with other elements it may. Birchfield says his privacy interest in the evidence of intoxication within his body is no longer a factor because the "search incident to arrest" doctrine is a recognized exception to the warrant requirement. So the only question remaining is whether the search should be conducted via a breath test or a blood test. Birchfield tells us that we must consider the availability of the less intrusive test in making this decision. Mr. Mitchell, however, was unconscious, so the breath test was not an option. A warrantless blood test was reasonable, therefore, because he had been arrested for OWI, evidence of the offense was continually dissipating, there was no telling how long he would be unconscious, his privacy interest in the evidence of intoxication within his body had been eviscerated by the arrest, and no less intrusive means were available to obtain the evanescent evidence.

¶81 I recognize that Birchfield holds a cautionary note about blood tests performed on unconscious suspects, but it appears to be in the form of an explanation for why the Court devoted just two sentences to the subject:

> It is true that a blood test, unlike a breath test, may be administered to a person who is unconscious (perhaps as a result of a crash) or who is unable to do what is needed to take a breath test due

> to profound intoxication or injuries. But we have no reason to believe that such situations are common in drunk-driving arrests, and when they arise, the police may apply for a warrant if need be.

Birchfield, 136 S. Ct. at 2184-85. Nothing in the opinion indicates the Supreme Court considered how its analytical structure would apply in the context of an unconscious suspect arrested for OWI, and it would be too much like reading tea leaves to give any substantive weight to a statement that simply gives the Court's reasons for not addressing the question we are deciding.[2]

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[2] The dissent believes Birchfield has already answered this question, and therefore concludes my "analytical exercise ultimately fails because it cannot be reconciled with Birchfield's central holding: 'a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving.'" Dissent, ¶101 n.6 (quoting Birchfield v. North Dakota, 136 S. Ct. 2160, 2185 (2016)) (emphasis omitted). The Supreme Court stated that central holding, however, in the context of a suspect who, unlike Mr. Mitchell, was conscious. This is a distinction that Birchfield itself advanced, so it's entirely justifiable to explore its significance, as I have done in this opinion.

But there is an even more important reason the dissent should be chary of finding such a categorical prohibition in that precedent: Birchfield is not comfortable in its own skin. Its central logic is actually self-contradictory, which explains why both the court and the dissent are able to call on it for support. If the Supreme Court had endorsed implied-consent laws as sufficient to authorize a breath or blood test (as our court says), then it would have held that implied consent justified the breath test. But it didn't. It said the "search incident to arrest" exception to the Fourth Amendment's warrant requirement justified the breath test. On the other hand, if Birchfield forbids blood draws pursuant to an implied-consent law, as the dissent claims, then such a law could not justify the breath test either, inasmuch as the law either provides constitutionally-sound consent for both, or for neither.

(continued)

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¶82 Apropos of nothing relevant to this case, the lead opinion says a quartet of the court's members, including the author of this concurrence and the justice who joins it, "label refusal of chemical testing a constitutional right [in State v. Dalton, 2018 WI 85, ¶61, 383 Wis. 2d 147, 914 N.W.2d 120]." See lead op., ¶53 n.13. If the lead opinion means to say that we understand the people of Wisconsin have a constitutionally-protected right to be free from warrantless, unreasonable searches, then it is spot-on. And if the lead opinion further means to say that we recognize that the people of Wisconsin may operationalize that constitutionally-protected right by refusing warrantless, unreasonable searches, then it again hits the bulls-eye. But none of that happened in Dalton. It happened when the people of this nation ratified the Bill of Rights. We have done nothing new here; we only recognize what is already the law.

¶83 Ultimately, the lead opinion is of two minds on whether a suspect may refuse a blood test, and it expressed both of them. On the one hand, it says that, "in a state with civil

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So I disagree with the dissent that I cannot reconcile my analytical exercise to Birchfield's central holding. When the Supreme Court speaks with two contradictory voices in one opinion, the best we can do is follow its logic until it starts contending with itself. Here, that means Birchfield stands for the proposition that, with respect to conscious drunk-driving suspects, the "search incident to arrest" doctrine covers breath tests, but not blood draws. Because Mr. Mitchell was not conscious, Birchfield does not control the disposition of this case.

penalties for refusal to submit to a blood draw, 'a person suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test.'" Lead op., ¶38 (quoting South Dakota v. Neville, 459 U.S. 553, 560 n.10 (1983)). But almost immediately afterwards it also said: "Of course, consent voluntarily-given before a blood draw may be withdrawn with or without a statutory reminder." Lead op., ¶40 (citing United States v. Sanders, 424 F.3d 768, 774 (8th Cir. 2005)). So which is it? May a suspect refuse a blood test or not?

¶84 Perhaps, however, the lead opinion means to say that when a blood test is conducted pursuant to consent—real consent, the kind that people provide, not legislatures—the consent can be withdrawn, but when conducted pursuant to legislatively-provided consent, it cannot. That seems to be the import of the observation that the "right to refuse the blood-alcohol test . . . is simply a matter of grace bestowed by the . . . legislature." See lead op., ¶39 (quoting Neville, 459 U.S. at 565). But if that is so, what possible jurisprudential theory allows a statute to make permanent what the constitution makes revocable?[3]

[3] The right to refuse a search, and to revoke consent once given, has been a part of Fourth Amendment jurisprudence for a very long time. See Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973) (stating that consent may be refused); United States v. Carter, 985 F.2d 1095, 1097 (D.C. Cir. 1993) (stating that consent may be withdrawn); United States v. Black, 675 F.2d 129, 138 (7th Cir. 1982) (same); Mason v. Pulliam, 557 F.2d 426, 428 (5th Cir. 1977) (stating that nothing in Schneckloth prevents consent from being withdrawn).

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¶85 For these reasons, I respectfully concur in our court's mandate.

¶86 I am authorized to state that Justice REBECCA GRASSL BRADLEY joins this concurrence.

¶87 ANN WALSH BRADLEY, J. *(dissenting)*. A blood draw is a particularly intrusive search. It invades the interior of the human body and implicates interests in human dignity and privacy. Schmerber v. California, 384 U.S. 757, 769-70 (1966). To allow a blood draw without a warrant runs counter to these significant interests, not to mention United States Supreme Court precedent.

¶88 The police took Gerald Mitchell's blood without a warrant while he was unconscious. According to the lead opinion[1], this is perfectly fine because Mitchell by implication "voluntarily consented" to a blood draw and, while he was unconscious, did not revoke such consent.

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[1] I use the term "lead" opinion for two reasons. First, I am concerned that without this cue, the reader may mistakenly believe that the lead opinion has any precedential value. Although five justices join in the mandate of the opinion to affirm the court of appeals (Roggensack, C.J., joined by Ziegler, J., Gableman, J., Rebecca Grassl Bradley, J., and Kelly, J.,), it represents the reasoning of only three justices (Roggensack, C.J., joined by Ziegler, J., and Gableman, J.). Justices Rebecca Grassl Bradley and Kelly joined in the mandate, but they would rely on contrary reasoning. Other paragraphs of the lead opinion that Justice Kelly indicates that he joins provide only uncontested factual and legal background that do not include the lead opinion's reasoning. See Justice Kelly's concurrence, ¶67 n.1.

Although set forth in two separate opinions, four justices disagree with the reasoning of the lead opinion. Importantly, contrary to the lead opinion, four justices determine that the implied consent laws cannot justify the warrantless blood draw performed in this case (Abrahamson, J., Ann Walsh Bradley, J., Rebecca Grassl Bradley, J., and Kelly, J.).

The lead opinion fails to alert readers as to the non-precedential status of its essential reasoning. Lest the rule of law be unclear to courts and litigants: BY THEMSELVES, THE IMPLIED CONSENT LAWS CANNOT JUSTIFY A WARRANTLESS BLOOD DRAW.

¶89 Contrary to the lead opinion, I determine that "implied consent" is not the same as "actual consent" for purposes of a Fourth Amendment search. By relying on the implied consent laws, the lead opinion attempts to create a statutory per se exception to the constitutionally mandated warrant requirement. Thus, it embraces a categorical exception over the constitutionally required consideration of the totality of the circumstances. Consent provided solely by way of an implied consent statute is constitutionally untenable.[2]

¶90 Accordingly, I respectfully dissent.

I

¶91 Mitchell was arrested for operating while intoxicated. En route to a nearby hospital, he lost consciousness. Despite Mitchell's incapacitation, a police officer read him the Informing the Accused form. Mitchell provided no response because he was unconscious. The officer then directed hospital staff to draw a sample of Mitchell's blood, and they did so. Mitchell remained unconscious as his skin was pierced and his blood taken.

¶92 Seeking to exclude the evidence obtained as a result of the blood draw, Mitchell filed a motion to suppress. He premised his motion on the contention that the warrantless

[2] I observe that the concurrence and this dissent are in accord on this point. The concurrence "do[es] not believe that the state can waive the people's constitutional protections against the state." Concurrence, ¶67. Accordingly, it concludes that "the consent implied by § 343.305 cannot justify the blood draw performed on Mr. Mitchell." Id., ¶73.

taking of his blood while he was unconscious violated his Fourth Amendment rights.

¶93 The lead opinion rejects Mitchell's argument, concluding that the consent exception to the Fourth Amendment's warrant requirement applies. Lead op., ¶3. According to the lead opinion, Mitchell "voluntarily consented to a blood draw by his conduct of driving on Wisconsin's roads and drinking to a point evidencing probable cause of intoxication." Id. Further, in the lead opinion's view, Mitchell "forfeited all opportunity, including the statutory opportunity under Wis. Stat. § 343.305(4), to withdraw his consent previously given . . . ." Id.

II

¶94 The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect against unreasonable searches and seizures. State v. Eason, 2001 WI 98, ¶16, 245 Wis. 2d 206, 629 N.W.2d 625. A warrantless search is presumptively unreasonable unless an exception to the warrant requirement applies. State v. Tullberg, 2014 WI 134, ¶30, 359 Wis. 2d 421, 857 N.W.2d 120.

¶95 One such exception to the warrant requirement is a search conducted pursuant to consent. State v. Artic, 2010 WI 83, ¶29, 327 Wis. 2d 392, 786 N.W.2d 430. The lead opinion correctly states that relevant words, gestures or conduct may support a finding of consent. Lead op., ¶20 (citing Artic, 327

Wis. 2d 392, ¶30).[3] However, it errs by departing from Mitchell's "words, gestures or conduct" to determine that he impliedly consented for the state to draw his blood.

¶96 The lead opinion's conclusion is based on Wisconsin's implied consent laws, one subsection of which provides that any person operating a motor vehicle in Wisconsin "is deemed to have given consent to one or more tests of his or her breath, blood or urine" when requested to do so by a law enforcement officer in certain circumstances. Wis. Stat. § 343.305(2).

¶97 Another subsection specifically addresses the situation where a driver is unconscious. Wisconsin Stat. § 343.305(3)(b) provides that "[a] person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subsection." It further states that a law enforcement officer may administer a breath, blood, or urine test if probable cause exists that the driver has committed any of a list of offenses. Id.

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[3] The lead also cites State v. Phillips, 218 Wis. 2d 180, 197, 577 N.W.2d 794 (1998), for the proposition that consent to search need not be given verbally. Lead op., ¶21. In Phillips, when asked by law enforcement whether they could search the defendant's bedroom, "the defendant did not respond verbally, but he opened the door to and walked into his bedroom, retrieved a small baggie of marijuana, handed the baggie to the agents, and pointed out a number of drug paraphernalia items." 218 Wis. 2d at 197. The court concluded that "[t]he defendant's conduct provides a sufficient basis on which to find that the defendant consented to the search of his bedroom." Id. The affirmative assistance provided by the defendant in response to a request to search in Phillips is a far cry from the complete lack of response from the defendant here.

¶98 In determining whether the warrantless taking of a blood draw from an unconscious person pursuant to Wis. Stat. § 343.305(3)(b) violates the Fourth Amendment, I begin my analysis with Birchfield v. North Dakota, 579 U.S. __, 136 S. Ct. 2160 (2016). In Birchfield, the United States Supreme Court determined that "a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving." Id. at 2185.

¶99 Birchfield emphasized the invasive nature of a blood test, which is significant for Fourth Amendment purposes. See id. at 2184. In comparison to a breath test, a blood test is "significantly more intrusive[.]" Id. As an intrusion "beyond the body's surface," a blood test implicates paramount "interests in human dignity and privacy[.]" Id. at 2183 (citing Schmerber, 384 U.S. at 769-70). Indeed, a blood test can provide a lot more information than just a person's blood alcohol content.[4]

¶100 The Birchfield court further addressed the precise circumstances that have arisen in this case:

> It is true that a blood test, unlike a breath test, may be administered to a person who is unconscious (perhaps as a result of a crash) or who is unable to

[4] "[A] blood test, unlike a breath test, places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading. Even if the law enforcement agency is precluded from testing the blood for any purpose other than to measure BAC, the potential remains and may result in anxiety for the person tested." Birchfield v. North Dakota, 579 U.S. __, 136 S. Ct. 2160, 2178 (2016).

> do what is needed to take a breath test due to profound intoxication or injuries. But we have no reason to believe that such situations are common in drunk-driving arrests, and when they arise, the police may apply for a warrant if need be.

136 S. Ct. at 2184-85 (emphasis added).

¶101 This language compels a single conclusion: law enforcement needed a warrant here. First, the State concedes that there were no exigent circumstances that would justify a departure from the warrant requirement.[5] Second, the ultimate holding in Birchfield was that a blood test cannot be administered as a search incident to arrest for drunk driving. Id. at 2185. The lead opinion's interpretation of the implied consent statutes attempts to accomplish exactly what the Birchfield court said violates the Fourth Amendment—a blood test as a search incident to the arrest of an unconscious person for drunk driving.[6]

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[5] See State v. Tullberg, 2014 WI 134, ¶30, 359 Wis. 2d 421, 857 N.W.2d 120.

[6] The concurrence focuses on language in Birchfield stating a blood test's "reasonableness must be judged in light of the availability of the less intrusive alternative of a breath test." Birchfield, 136 S. Ct. at 2184; see concurrence, ¶¶77-79. It creatively interprets this language to indicate that, because a breath test was unavailable due to Mitchell's unconsciousness, a blood test was constitutionally reasonable. Id., ¶80. The concurrence's analytical exercise ultimately fails because it cannot be reconciled with Birchfield's central holding: "a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving." Birchfield, 136 S. Ct. at 2185 (emphasis added).

(continued)

¶102 Unlike the lead opinion, I would follow, rather than attempt to overrule, the court of appeals in State v. Padley, 2014 WI App 65, 354 Wis. 2d 545, 849 N.W.2d 867. The Padley court emphasized that, when analyzing whether there was a consensual search, the determining factor was whether the driver gave actual consent to the blood draw:

> [T]he implied consent law is explicitly designed to allow the driver, and not the police officer, to make the choice as to whether the driver will give or decline to give actual consent to a blood draw when put to the choice between consent or automatic sanctions. Framed in the terms of "implied consent," choosing the "yes" option affirms the driver's implied consent and constitutes actual consent for the blood draw. Choosing the "no" option acts to withdraw the driver's implied consent and establishes that the driver does not give actual consent.

354 Wis. 2d 545, ¶39. As Justice Abrahamson has explained, "[t]he Padley court concluded that a driver's actual consent occurs after the driver has heard the Informing the Accused Form, weighed his or her options (including the refusal penalties), and decided whether to give or decline actual consent." State v. Brar, 2017 WI 73, ¶116, 376 Wis. 2d 685, 898 N.W.2d 499 (Abrahamson, J., dissenting).

Federal and state courts around the country have cited the "but not a blood test" language a multitude of times. See, e.g., Robertson v. Pichon, 849 F.3d 1173, 1184 n.7 (9th Cir. 2017; Espinoza v. Shiomoto, 215 Cal. Rptr. 3d 807, 829 (Ct. App. 2017); State v. Ryce, 396 P.3d 711, 717 (Kan. 2017); State v. Reynolds, 504 S.W.3d 283, 307 (Tenn. 2016). The concurrence is unable to cite to any court that eschews the clear language of Birchfield's central holding in favor of the unique interpretation it now embraces.

¶103 That implied consent and actual consent are separate and distinct concepts is confirmed by an analysis of recent United States Supreme Court precedent in addition to Birchfield.[7] In Missouri v. McNeely, the Supreme Court determined that "[w]hether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." 569 U.S. 141, 156 (2013). A case by case determination is the antithesis of a categorical exception. Although McNeely was an exigent circumstances case, the court's emphasis on the totality of the circumstances suggests broad application of the case by case determinations it requires. Brar, 376 Wis. 2d 685, ¶122 (Abrahamson, J., dissenting).

¶104 Indeed, the Supreme Court implied such a broad application of McNeely in Aviles v. Texas, 571 U.S. 1119 (2014). In Aviles, the Court vacated a Texas judgment upholding a warrantless blood draw based not on actual consent but on implied consent derived through the Texas implied consent law. 571 U.S. 1119 (2014). The Court further remanded the Aviles case to the Texas court of appeals for further consideration in light of McNeely. Id.

¶105 "Aviles suggests that McNeely should be read broadly to apply to all warrantless blood draws and that the Texas implied consent statute was not a per se exception to the Fourth

[7] For further in-depth analysis of this assertion, see State v. Brar, 2017 WI 73, ¶¶119-126, 376 Wis. 2d 685, 898 N.W.2d 499 (Abrahamson, J., dissenting).

Amendment justifying warrantless blood draws." Brar, 376 Wis. 2d 685, ¶123 (Abrahamson, J., dissenting). On remand the Texas court of appeals concluded that the Texas implied consent statute "flies in the face of McNeely's repeated mandate that courts must consider the totality of the circumstances of each case." Aviles v. State, 443 S.W.3d 291, 294 (Tex. Ct. App. 2014).

¶106 The upshot of these United States Supreme Court cases is that reliance on an implied consent statute to provide actual consent to a Fourth Amendment search violates McNeely's requirement that each blood draw in a drunk driving case be analyzed on a case by case basis. The implied consent statute attempts to create a per se exception to the warrant requirement. Of course, categorical consent is by definition not individualized.

¶107 The lead opinion employs the simple act of driving an automobile as justification for a search. The untenability of the lead opinion's position is aptly illustrated by Justice Kelly's concurrence in Brar, 376 Wis. 2d 685, ¶¶59-66 (Kelly, J., concurring). As Justice Kelly explains, a court's normal constitutional inquiry into whether consent is given involves an examination of the totality of the circumstances and a determination that the consent was voluntary and not mere acquiescence to authority. Id., ¶¶59-62. On the other hand, "[f]or 'consent' implied by law, we ask whether the driver drove his car." Id., ¶64.

¶108 Further, the lead opinion errs by relying not on a constitutionally well-recognized exception to the warrant requirement, but instead on a Wisconsin statute, to curtail constitutional protections. By seeking to create a statutory, per se consent exception to the warrant requirement, the lead opinion further steps into a minefield. See lead op., ¶¶53-55 (asserting that Mitchell "forfeited the statutory opportunity to withdraw the consent to search that he had given.").

¶109 A blood draw is plainly a "search" for Fourth Amendment purposes. Birchfield, 136 S. Ct. at 2185. Accordingly, one has a constitutional right, not merely a statutory right, to refuse such a search absent a warrant or an applicable exception.[8] See State v. Dalton, 2018 WI 85, ¶61, 383 Wis. 2d 147, 914 N.W.2d 120. Under the lead opinion's analysis, however, the opportunity to refuse an unconstitutional search is merely a matter of legislative grace. If the ability to withdraw consent is merely statutory, could the legislature remove the ability to withdraw consent entirely? For the Fourth Amendment to have any meaning, such a result cannot stand.

¶110 I therefore conclude that implied consent is insufficient for purposes of a Fourth Amendment search. As the

[8] The lead opinion's reliance on South Dakota v. Neville, 459 U.S. 553, 560 n.10 (1983), is misplaced. See lead op., ¶¶38-39. Neville was decided pre-McNeely and pre-Birchfield. Both McNeely and Birchfield have had a significant effect on drunk driving law, and highlight the constitutional nature of a blood draw. Both cases analyze breath and blood tests as Fourth Amendment searches and appear to supersede the statement from the Fifth Amendment Neville case on which the lead opinion relies.

court of appeals explained in Padley, the implied consent law does not authorize searches. Rather, it authorizes law enforcement to require a driver to make a choice: provide actual consent and potentially give the state evidence that the driver committed a crime, or withdraw implied consent and thereby suffer the civil consequences of withdrawing consent. Padley, 354 Wis. 2d 545, ¶39.

¶111 A person who is unconscious cannot make this choice. Because he was unconscious, Mitchell did not react to the Informing the Accused Form when law enforcement presented him with his options. He exhibited no "words, gestures, or conduct" that would indicate his actual consent to a blood draw. See Artic, 327 Wis. 2d 392, ¶30.

¶112 Because consent provided solely by way of an implied consent statute is not constitutionally sufficient, I determine that the results of Mitchell's blood draw must be suppressed. Accordingly, I respectfully dissent.

¶113 I am authorized to state that Justice SHIRLEY S. ABRAHAMSON joins this dissent.

Appeal No. 2015AP304-CR Cir. Ct. No. 2013CF365

WISCONSIN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

GERALD P. MITCHELL,

DEFENDANT-APPELLANT.

FILED

MAY 17, 2017

Diane M. Fremgen
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

Pursuant to WIS. STAT. RULE 809.61, this appeal is certified to the Wisconsin Supreme Court for its review and determination.

ISSUE

This cases raises a single question: whether the warrantless blood draw of an unconscious motorist pursuant to Wisconsin's implied consent law, where no exigent circumstances exist or have been argued, violates the Fourth Amendment.

BACKGROUND

Gerald P. Mitchell was charged with operating a motor vehicle while intoxicated (OWI), and operating with a prohibited alcohol concentration (PAC).[1] He moved to suppress the results of a blood test taken while he was unconscious. The parties do not contest the basic facts on appeal.

Officer Alexander Jaeger was the sole witness at the suppression hearing. He testified that around 3:17 p.m. on May 30, 2013, he received a dispatch call to check on the welfare of a male subject in Sheboygan County. When he arrived, he spoke with the complainant, Alvin Swenson, who informed Jaeger that he knew Mitchell and "received a telephone call from ... Mitchell's mother concerned about his safety." Swenson told Jaeger that he went to his window shortly after the call and observed Mitchell in a discombobulated state. Mitchell was "very disoriented," and he "appeared [to be] intoxicated or under the influence, was stumbling, had thrown a bag of garbage into the backyard and had great difficulty maintaining balance, nearly falling several times before getting into a gray minivan and driving away."

Jaeger was able to locate Mitchell walking down St. Clair Avenue about one-half hour after speaking with Swenson. A gray van was also found nearby on Michigan Avenue. Mitchell's state was consistent with what Swenson described. Mitchell was not wearing a shirt, and was wet and covered in sand "similar to if you had gone swimming in the lake." Jaeger explained that Mitchell

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[1] Mitchell had six previous OWI convictions, which subjected him to enhanced penalties. *See* WIS. STAT. § 346.65(2)(am)6. (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

"was slurring his words" and "had great difficulty in maintaining balance," nearly falling over "several times," necessitating Jaeger and another officer to help him "to ensure he wouldn't fall."

Initially, Mitchell stated that he had been drinking "in his apartment." However, he later altered his story and informed Jaeger "that he was drinking down at the beach" and parked his vehicle "because he felt he was too drunk to drive." Jaeger further explained that Mitchell's current condition made administration of the standard field sobriety tests unsafe, so he declined to administer them. Jaeger did administer a preliminary breath test, which indicated an alcohol concentration of .24. Based on his observations, Jaeger arrested Mitchell for OWI at approximately 4:26 p.m.

On the way to the police station, Mitchell's condition began to decline, and he became more lethargic. Upon arriving at the station, Mitchell had to be helped out of the squad car. Jaeger concluded that a breath test would not be appropriate, and he took Mitchell from the station to the hospital for a blood test. The drive took approximately eight minutes. During the drive, Mitchell "appeared to be completely incapacitated, would not wake up with any type of stimulation, and had to be escorted into the hospital by wheelchair." Jaeger then read the "Informing the Accused form verbatim" to the inert Mitchell. Mitchell did not respond. Because of Mitchell's "unusual" level of incapacitation, obtaining affirmative verbal "consent" at that time was not possible. Jaeger admitted on cross-examination that he could have applied for a warrant; he did not.

Accordingly, at 5:59 p.m. a blood sample was taken, which revealed a blood alcohol concentration of .222g/100mL.[2]

Mitchell argued that the blood test should be suppressed because it was taken without a warrant or his consent. The State responded that Mitchell had consented to the blood draw via the "implied consent" provided for in WIS. STAT. § 343.305. The State explained that under § 343.305(3)(b), unconscious persons are presumed not to have withdrawn their consent, and therefore—because Mitchell was unconscious—the warrantless blood draw was pursuant to this (implied) consent.

The State expressly disclaimed that it was relying on exigent circumstances to justify the draw, explaining that "[t]here is nothing to suggest that this is a blood draw on [an] exigent circumstances situation when there has been a concern for exigency." The circuit court denied Mitchell's motion, reasoning that WIS. STAT. § 343.305(3)(b) "makes clear that an unconscious operator .... cannot withdraw their consent to a blood sample." The only remaining question, the court reasoned, was whether probable cause supported the blood draw, which it clearly did.

After a jury trial, Mitchell was convicted on both the OWI count and the PAC count. He was sentenced to three years of initial confinement and three years of extended supervision on each count to be served concurrently. Mitchell appeals from his convictions.

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[2] Although the specific results were not mentioned during the suppression hearing, Mitchell entered into a stipulation at trial that the results were .222g/100mL.

DISCUSSION

This case squarely asks whether the "implied consent" outlined in WIS. STAT. § 343.305(3)(b) constitutes consent to a search under the Fourth Amendment. Although no case has explicitly decided the precise issue of whether a warrantless blood draw on an unconscious motorist may be justified solely by "implied consent," our precedents do address whether statutory implied consent is actual consent. These cases offer differing answers to that question, and accordingly, we must certify. *See* ***Marks*** *v.* ***Houston Cas. Co.***, 2016 WI 53, ¶¶78-79, 369 Wis. 2d 547, 881 N.W.2d 309 (holding that the court of appeals should certify an issue where two of its cases conflict).

We certified this precise issue previously in ***State*** *v.* ***Howes***, No. 2014AP1870-CR, unpublished certification (WI App Jan. 28, 2016). Although certification was granted, the lead opinion decided the case on the basis that exigent circumstances justified the search. ***State*** *v.* ***Howes***, 2017 WI 18, ¶3, 373 Wis. 2d 468, ___ N.W.2d ___. Justice Gableman, joined by Justice Ziegler, authored a concurrence explaining his view that implied consent constitutes actual consent. *Id.*, ¶¶52, 84 (Gableman, J., concurring). Justice Abrahamson authored a dissent that explained her view that implied consent did not constitute actual consent for Fourth Amendment purposes. *Id.*, ¶¶89, 136 (Abrahamson, J., dissenting). She was joined in this reasoning by Justice Ann Walsh Bradley and Justice Kelly. *Id.*, ¶154. With no controlling majority view, this question remains unanswered.

This case presents the opportunity to clarify the law head-on. While consent is not the only circumstance in which a warrantless search is permissible, none of the other "few" and "well-delineated" exceptions were argued, briefed, or

otherwise addressed. *See* ***State*** *v.* ***Faust***, 2004 WI 99, ¶11, 274 Wis. 2d 183, 682 N.W.2d 371 ("Subject to a few well-delineated exceptions, warrantless searches are deemed per se unreasonable under the Fourth Amendment."). In particular, this case is not susceptible to resolution on the ground of exigent circumstances. No testimony was received that would support the conclusion that exigent circumstances justified the warrantless blood draw. Jaeger expressed agnosticism as to how long it would have taken to obtain a warrant, and he never once testified (or even implied) that there was no time to get a warrant. The State, which bears the burden to prove that exigent circumstances existed and justified the warrantless intrusion, conceded that this exception is inapplicable below, and it does the same before us. The sole question, then, is whether Mitchell consented to the blood draw.

A. Legal Overview

The Fourth Amendment of the United States Constitution and article I, section 11 of the Wisconsin Constitution prohibit unreasonable searches and seizures. Under these provisions, "[w]arrantless searches are per se unreasonable, subject to several clearly delineated exceptions." ***State*** *v.* ***Artic***, 2010 WI 83, ¶29, 327 Wis. 2d 392, 786 N.W.2d 430. Consent is one of these "clearly delineated exceptions." ***Id.*** Although consent may be given by "words, gestures, or conduct," it must be actual consent, which is a question of historical fact. ***Id.***, ¶30. It is the State's burden to establish and prove by clear and convincing evidence that consent was voluntary. ***Id.***, ¶32.

The United States Supreme Court has "referred approvingly of the general concept of implied consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." ***Birchfield*** *v.*

North Dakota, 136 S. Ct. 2160, 2185 (2016). But it has yet to decide whether the "implied consent" that flows from a statutory scheme constitutes actual Fourth Amendment consent. *See id.* at 2185. Some state courts have concluded that statutory implied consent satisfies the Fourth Amendment. *See, e.g.*, *Bobbeck v. Idaho Transp. Dep't*, 363 P.3d 861, 866-67 (Idaho Ct. App. 2015), *review denied* (Idaho Dec. 23, 2015). Others have reasoned that such implied consent is a legal fiction that does "not take into account the totality of the circumstances" as required by the United States Supreme Court, and therefore implied consent alone cannot justify a warrantless search. *See, e.g.*, *Aviles v. State*, 443 S.W.3d 291, 294 (Tex. App. 2014) (citation omitted).

Wisconsin's implied consent law is contained in WIS. STAT. § 343.305. It provides as follows:

> Any person who ... drives or operates a motor vehicle upon the public highways of this state ... is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol ... when requested to do so by a law enforcement officer under sub. (3)(a) or (am) or when required to do so under sub. (3)(ar) or (b). Any such tests shall be administered upon the request of a law enforcement officer.

Sec. 343.305(2). Because Mitchell was unconscious, it is the "implied consent" to submit to a blood test "when required to do so" under para. (3)(b) that concerns us here.

Addressing unconscious motorists, WIS. STAT. § 343.305(3)(b) operates in a simple, straightforward manner. It provides the following:

> A person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subsection, and if a law enforcement officer has probable cause to believe that the person has

> violated [WIS. STAT. §] 346.63(1) .... one or more samples specified in par. (a) or (am) may be administered to the person.

Id. Thus, by choosing to drive on public roads prior to losing consciousness, an unconscious person is "deemed to have given consent" to his or her blood being tested. That consent is "presumed" not to have been withdrawn. Accordingly, an officer may act on this "implied consent" and conduct a warrantless blood draw provided that the officer "has probable cause to believe" the unconscious person has violated WIS. STAT. § 346.63(1)—as Jaeger concededly did here.

B. The Parties' Positions

The parties agree that WIS. STAT. § 343.305(3)(b) is the applicable provision at issue. Neither party contests that Jaeger had probable cause to believe Mitchell was guilty of OWI at the time of the blood draw. The parties disagree, however, about whether the blood draw was reasonable under the Fourth Amendment.

The State relies exclusively on Mitchell's "implied consent" to justify the warrantless blood draw. The State's position is simple: Mitchell consented to have his blood drawn when he drove on Wisconsin highways and never withdrew that consent. In the State's view, this "consent" passes constitutional muster.

Mitchell takes the position that statutory implied consent cannot operate as Fourth Amendment consent because he had "no opportunity to consent or to refuse consent." In his view, consent occurs when an officer reads the Informing the Accused, not when a person drives on Wisconsin roads. Because he was incapable of giving affirmative consent to the blood draw, he concludes that

the blood draw cannot be justified under the consent exception.[5] Thus, though he does not quite frame it as such, his argument is in effect that the implied consent applying to unconscious individuals as described in WIS. STAT. § 343.305(3)(b) is unconstitutional—i.e., it cannot justify a warrantless blood draw.

C. Our Precedents Offer Conflicting Answers

Our certification in ***Howes*** explained in much greater detail the case law and constitutional background to this question. Having just considered ***Howes***, the members of the court are well aware of the important questions and various arguments pro and con. Rather than retread and repeat the same ground, we briefly explain why we believe we are compelled to certify this question again. Namely, two of our own cases—***State v. Padley***, 2014 WI App 65, 354 Wis. 2d 545, 849 N.W.2d 867, and ***State v. Wintlend***, 2002 WI App 314, 258 Wis. 2d 875, 655 N.W.2d 745—specifically addressed how the implied consent statute operates and whether it satisfies the consent exception, and both came to incompatible answers.

In ***Padley***, it was undisputed that the defendant actually consented to having her blood drawn. ***Padley***, 354 Wis. 2d 545, ¶11. At issue, was whether Padley's consent was voluntary. ***Id.***, ¶12. We rejected her argument that her

[5] Mitchell additionally urges that WIS. STAT. § 343.305(3)(b) should not apply where police have time to obtain a warrant. Because "the warrant process would not have significantly increased the delay before the blood test could be conducted," he maintains Jaeger was required to obtain a warrant. He grounds his argument in "public policy" and the Supreme Court's exigent circumstances analysis in *Missouri v. McNeely*, 133 S. Ct. 1552 (2013). However, because the State has conceded that the blood draw was not justified by exigent circumstances, this argument need not be addressed. The real issue is whether Mitchell consented to the blood draw. If he did, the practicality of obtaining a warrant is immaterial; the search would be justified under the consent exception.

consent was coerced, concluding that the implied consent statute offered Padley a choice between consenting to the blood draw or withdrawing her "implied consent" and facing the statutory penalties. ***Id.***, ¶27. Although this choice was difficult, we concluded that it passed constitutional muster. ***Id.*** In our discussion, we explained the meaning of "implied consent" in a manner that affects this case.

> On occasion in the past we have seen the term "implied consent" used inappropriately to refer to the consent a driver gives to a blood draw at the time a law enforcement officer requires that driver to decide whether to give consent. However, actual consent to a blood draw is not "implied consent," but rather a possible result of requiring the driver to choose whether to consent under the implied consent law.
>
> There are two consent issues in play when an officer relies on the implied consent law. The first begins with the "implied consent" to a blood draw that all persons accept as a condition of being licensed to drive a vehicle on Wisconsin public road ways. The existence of this "implied consent" does not mean that police may require a driver to submit to a blood draw. Rather, it means that, in situations specified by the legislature, if a driver chooses not to consent to a blood draw (effectively declining to comply with the implied consent law), the driver may be penalized....

Id., ¶¶25-26. In other words, implied consent (at least in that scenario) was not actual consent, but a choice between two alternatives: consent or face statutory penalties.

We also took the time to "address some confusion in the arguments of the parties regarding the implied consent law." ***Id.***, ¶37. Of particular note, we explicitly rejected the State's argument that "implied consent ... is still consent." ***Id.*** The contention that "'implied consent' alone can 'serve as a valid exception to the warrant requirement'" was, we stated, "incorrect." ***Id.*** We explained, "It is incorrect to say that a driver who consents to a blood draw ... has given 'implied

consent.'" ***Id.***, ¶38. Rather, in that circumstance "consent is *actual* consent, not *implied* consent." ***Id.*** (emphasis added). We further reasoned that "the implied consent law is explicitly designed to allow the driver, and not the police officer, to make the choice as to whether" to give consent. ***Id***, ¶39. Said another way, implied consent is not really consent; it "does not authorize searches." ***Id***, ¶40. Rather, it is a legal trigger that authorizes law enforcement to require a choice: actually consent or face sanctions. ***Id***, ¶40. We acknowledged tension between this view of implied consent and the statute's clear statement that "implied consent is deemed the functional equivalent of actual consent" for unconscious drivers under certain circumstances. ***Id.***, ¶39 n.10. However, we left resolution of that "tension" for another day. ***Id.*** Though the discussion in ***Padley*** was based on it's statutory application to conscious drivers, the case still sets forth two broad propositions of law: (1) consent is given (or "withdrawn") at the time the officer reads the Informing the Accused form, and (2) "implied consent" does not by itself satisfy the consent exception.

Several years prior to ***Padley***, we addressed the implied consent statute in ***Wintlend***. In that case, we were faced with the same scenario as ***Padley***: a motorist was stopped for OWI, was read the Informing the Accused warnings, and consented to a blood draw. ***Wintlend***, 258 Wis. 2d 875, ¶2. As in ***Padley***, Wintlend argued that although he consented to the blood draw, his consent was not voluntary.

Critical to whether Wintlend's consent was coerced was the question of the precise time "coercion rears its head." ***Wintlend***, 258 Wis. 2d 875, ¶14. In other words, when did Wintlend consent for Fourth Amendment purposes? Wintlend maintained (like our later decision in ***Padley***) that he consented at the time the officer read him the Informing the Accused warnings. ***Id.*** He further

argued that his consent was coerced because he was forced to choose to either consent to a blood draw or face suspension of his license. ***Id.*** We rejected his arguments. Relying on ***State v. Neitzel***, 95 Wis. 2d 191, 289 N.W.2d 828 (1980)—a case not addressing the consent exception or the Fourth Amendment—we reasoned that WIS. STAT. § 343.305 provides that "when a would-be motorist applies for and receives an operator's license, that person submits to the legislatively imposed condition that, upon being arrested for driving while under the influence, he or she consents to submit to the prescribed chemical tests." ***Wintlend***, 258 Wis. 2d 875, ¶12.[4] Thus, for Fourth Amendment purposes, "the time of consent is when a license is obtained," not when confronted with the Informing the Accused warnings. ***Id.***, ¶¶12-14.

We further concluded that the implied consent given when a license is obtained is actual, Fourth Amendment consent, and that such consent is voluntary. ***Id.***, ¶¶13-14. We explained:

> [I]t stands to reason that any would-be motorist applying for a motor vehicle license is not coerced, at that point in time, into making the decision to get a license conditioned on the promise that if arrested for drunk driving, the motorist agrees to take a test or lose the license.

Id., ¶13. Because there was no unconstitutional coercion, we concluded that Wintlend's implied consent—which he gave as a condition of receiving a license—satisfied the consent exception. ***Id.***, ¶¶1, 19. Again, two critical points

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[4] Here too we conceded some tension. The conclusion that implied consent takes place when a person obtains his or her license does not sit comfortably with the plain language of WIS. STAT. § 343.305(2) that any person "who drives or operates a motor vehicle upon the public highways ... is deemed to have given consent." ***State v. Wintlend***, 2002 WI App 314, ¶15, 258 Wis. 2d 875, 655 N.W.2d 745. But we concluded that we were bound by our interpretation of ***State v. Neitzel***, 95 Wis. 2d 191, 289 N.W.2d 828 (1980). ***Wintlend***, 258 Wis. 2d 875, ¶14.

of reasoning emerge, both contrary to ***Padley***'s reasoning. First, the consent that matters for Fourth Amendment purposes takes place when a motorist obtains his or her license, and second, this statutory "implied consent" is sufficient to satisfy the consent exception to the Fourth Amendment.

Like ***Wintlend*** and ***Padley***, the issue here is whether the "implied consent" that is statutorily deemed to have occurred when a driver chooses to drive on a public road supplies voluntary consent to a blood draw for Fourth Amendment purposes under the conditions set forth in the law. Because Mitchell was unconscious at the time of the blood draw, the only possible way to conclude he consented is to hold that "implied consent" under WIS. STAT. § 343.305 is actual, Fourth Amendment consent. On this question, ***Wintlend*** and ***Padley*** offer, or at least strongly suggest, two different answers. ***Wintlend*** implies that the "implied consent" provided for in WIS. STAT. § 343.305 is actual, voluntary consent, at least so long as the suspect does not withdraw that consent. ***Padley***, on the other hand, explicitly rejected that position when it was offered by the State. The cases also disagree about when consent is given—an issue critical to whether consent is in fact given and voluntary. Neither case directly addressed our precise factual issue, but we cannot resolve this case without ignoring or modifying the differing analyses in ***Padley*** and ***Wintlend***.

Wintlend predates ***Padley*** and might arguably govern. *See* ***Marks***, 369 Wis. 2d 547, ¶78. But as we are unable to resolve conflicts in precedent, the proper course of action in this situation is to certify the question. ***Id.***, ¶79 (holding that the court of appeals may not "overrule, modify, or withdraw language from a previously published decision" and a court of appeals decision "that a case impermissibly modified an earlier case and is thus not binding is effectively the

same as overruling that case"). We ask the Wisconsin Supreme Court to accept certification and provide clear guidance to the bench, the bar, and the public.

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STATE OF WISCONSIN CIRCUIT COURT SHEBOYGAN COUNTY

State of Wisconsin,

Plaintiff,

Waiving Suppression

MOTION HEARING

v.

Gerald P. Mitchell,

Case No. **13 CF 365**

Defendant.

Court Official: Honorable Terence T. Bourke

Date of Proceeding: **October 16, 2013**

COPY

APPEARANCES

The Plaintiff appears by

Assistant District Attorney Nathan Haberman

The Defendant appears in person with

Attorney Charles Wingrove

TRANSCRIPT OF PROCEEDINGS

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THE COURT: This is case number 13 CF 365, State versus Gerald Mitchell. He's here with Attorney Charles Wingrove. Nathan Nahrwold is here for the State.

This is a motion challenging the blood draw. And Mr. Wingrove, apparently you just handed me something. Does this relate to this motion?

ATTORNEY WINGROVE: Yes it does, Your Honor. When I had first appeared with Mr. Mitchell and advised the Court we were going to bring a suppression motion, I also advised the Court that relying on DNS 92 and 42 CFR part two, we were going to argue that the proper procedure is to disclose the information from the hospital, those records, hasn't been followed, and that becomes another reason for suppression.

THE COURT: So it really has nothing to do with the facts behind the motion.

ATTORNEY WINGROVE: It's -- I hope to develop a very few facts at the hearing in support of it. And it's just another way of addressing the issue of they should have got a warrant for the blood draw.

THE COURT: All right. Mr. Nahrwold, go ahead.

ATTORNEY NAHRWOLD: Thank you, Your Honor. The State would call Officer Alexander Jaeger.

** OFFICER ALEXANDER JAEGER, **

called as a witness, having been first duly sworn, was examined and testified as follows:

COURT CLERK: State your name and spell your last name.

THE WITNESS: Officer Alex Jaeger, J-A-E-G-E-R.

THE COURT: Go ahead please.

DIRECT EXAMINATION

BY ATTORNEY KASSENBORG:

Q Mr. Jaeger, how are you employed, sir?

A City of Sheboygan police officer.

Q And how long have you been a police officer for with the City of Sheboygan?

A At the City about five years.

Q So you have any other law enforcement experience beyond the City?

A I have approximately three years prior with the Sheboygan County Sheriff's Department as a patrol deputy.

Q So is that about eight years in total?

A Yes.

Q And in your eight years of law enforcement experience have you conducted investigations regarding people who are intoxicated due to the

consumption of alcohol or other drugs?

A Yes.

Q And what is your training regarding that?

A State certification in the administration of standardized field sobriety tests.

Q And have you in your training received the certification using the National Highway Transportation Safety Administration standard?

A Yes.

Q And as part of your law enforcement career about how many investigations have you been involved in that surround an OWI?

A Involved in? I would say well over two hundred.

Q And are you trained to use the preliminary breath test?

A Yes.

Q Directing your attention to May 30, 2013, at about 3:17 p.m. did you receive a dispatch?

A Yes I did.

Q And you were working at this time as a law enforcement officer?

A Yes.

Q And what was the dispatch in regards to?

A Check welfare complaint.

Q And where were you supposed to go?

A An address on North 7th Street near -- correction -- North Eighth Street near St. Clair Avenue. I don't recall the specific address number.

Q In any event that's in the city of Sheboygan, county of Sheboygan, state of Wisconsin?

A Yes.

Q And what information were you provided with prior to arriving there?

A Check welfare complaint, checking the welfare of a male subject.

Q Were you given a name?

A I don't recall if I was specifically given a name at that time.

Q And when you arrived at that location near North Eighth Street and St. Clair, who did you speak to, if anyone?

A I spoke with the complainant, Alvin Swenson.

Q What did Alvin indicate to you about the person's welfare?

A Alvin indicated that he had received a telephone call from Gerald Mitchell's mother concerned about his safety as he had made a statement about his personal well-being to her. Alvin further went on to tell me that he shortly thereafter went to his

window and observed Mr. Swenson -- I'm sorry -- observed Mr. Mitchell exiting the apartment behind where he lives, and he appeared to be very disoriented.

Q Did Alvin describe the nature of his relationship or familiarity with Mr. Mitchell?

A Yes. He said the two had recently resided together.

Q And what did Alvin describe about what he observed involving Mr. Mitchell's activities?

A He said that Mr. Mitchell had in his words appeared intoxicated or under the influence, was stumbling, had thrown a bag of garbage into the backyard and had great difficulty in maintaining balance, nearly falling several times before getting into a gray minivan and driving away.

Q And --

[redacted]: I'm going to object. I understand this is for a probable cause determination, so I'm assuming it's not being offered for the truth of the matter asserted, just that's what Mr. Swenson said.

[redacted]: Well, Judge, even if it is offered for the truth of the matter, hearsay doesn't apply at this kind of motion hearing. It is a motion under 900.04, and it's a question concerning the admissibility of evidence.

So the Court is not bound by the rules of evidence, and that would include hearsay.

THE COURT: I got to say you two are both talking over my head. Start again, Mr. Wingrove.

ATTORNEY WINGROVE: I was assuming that the testimony's being offered for the purposes of establishing probable cause.

THE COURT: That's correct.

ATTORNEY WINGROVE: Then I was going to mak a point that it shouldn't be received for the truth of the matter asserted. This step of the hearing, as I see it, is about whether the officer developed enough facts to get probable cause to arrest the defendant.

THE COURT: So. I agree with that. What's your objection to that, Mr. Huberman?

ATTORNEY HUBERMAN: Your Honor, I think it can be offered for the truth of the matter and, that is, did Alvin say that and did Alvin see that. And the reason it c be offered for that is because the hearsay rule doesn't appl at this type of hearing because it's a question concerning the admissibility of evidence.

THE COURT: Right. But I can't make a finding that Mr. Mitchell's drunk because of what Alvin Swenson said.

ATTORNEY HUBERMAN: It's not going to be th

The

only fact, but it could be a factor.

THE COURT: I know. I think you two are talking about different issues.

ASSISTANT PROSECUTOR: Okay.

BY ASSISTANT PROSECUTOR:

Q Officer, after you received that information from Mr. Swenson, were you able to communicate with other law enforcement officers and locate Mr. Mitchell?

A Yes.

Q And tell me about how soon after your conversation with Mr. Swenson did you locate Mr. Mitchell?

A Approximately a half hour.

Q And describe how you came in contact with Mr. Mitchell.

A As I was outside in my squad, a community service officer who works for the Police Department was also in the area and had located a male subject matching the physical description that I had provided out to other officers walking towards us about a block, half a block away. He appeared intoxicated and was possibly bothering a female pedestrian.

Q And before -- I should have asked this question before we went to that one. Before you located

Mr. Mitchell did you have contact with his mother, Carol Mitchell?

A Yes.

Q And what was the nature of that contact?

A I was concerned about the statement that Mr. Swenson had said. He had told me that his mother had called him concerned about a conversation she had with Mr. Mitchell over the phone. He made some vague statements about potentially harming himself, and she was concerned about that. And I also needed to obtain the vehicle information that she had -- I learned she had actually owned the van that Mr. Mitchell had driven away in, and she provided me a license plate.

Q So the information that Ms. Mitchell provided you regarding a van that Mr. Mitchell drives, was that consistent, inconsistent, or something else with the information you received from Mr. Swenson about the van he observed the defendant get -- or Mr. Mitchell get into?

ATTORNEY WINGROVE: I'm going to object. That sounds like we're having one witness, one hearsay witness testify as to the credibility of another hearsay witness.

THE COURT: I didn't take it that way.

ATTORNEY WINGROVE: You're the judge.

THE COURT: Well, it's corroborating evidence. We're talking about the officer's state of mind for probable cause. I don't have any problem overruling your objection. So go ahead.

BY ATTORNEY HABERMAN:

Q Do you need me to ask that question again, Officer Jaeger, or do you understand that?

A Please ask again.

Q The description of the van that was provided by Ms. Mitchell, did that match, was that -- I'm sorry -- was that consistent, inconsistent, or something else with the description of the van that Mr. Swenson provided you?

A It was consistent, a gray van.

Q Okay. When you had contact with Mr. Mitchell, what did you notice about his demeanor?

A He was slurring his words, stumbling. He was wearing jeans but no shirt, was wet, and he had a large amount of sand on his body similar to if you had gone swimming in the lake.

Q Did the observations you made of Mr. Mitchell provide any indication to you about intoxication?

A Yes.

Q Describe that.

A He was slurring his words. He had great difficulty in maintaining balance, nearly fell several times to the point where another officer and myself had to extend our arms out to ensure he wouldn't fall. When the transition when I actually brought him across the street to the sidewalk area so we were out of traffic, he nearly fell after stepping up and over the curb. And he admitted actually that he had been drinking.

Q Do you see Mr. Mitchell in court today?

A Yes I do.

Q Can you describe him for the Court by what he's wearing and where he's seated please?

A Red jumpsuit at the defendant's table.

ATTORNEY HABERMAN: Your Honor, let the record reflect identification please.

ATTORNEY WINGROVE: We'll stipulate for today's purposes.

THE COURT: All right. Thank you.

BY ATTORNEY HABERMAN:

Q And Officer, you indicated the defendant made some statements about drinking. Describe that for us. What did he say?

A He admitted initially that he had been drinking.

He was drinking in his apartment. And would not tell me if he was drinking with anyone or who anyone -- who it would be that he was drinking with. And he said that he had been drinking just prior to our contact.

Q And as a result of his drinking what, if anything, did he say about the specific items he was drinking or numbers of drinks?

A He had later changed his story that he was drinking down at the beach, that he parked his car on Michigan Avenue because he felt he was too drunk to drive, and that he had four shots of vodka.

Q At that point had you received any information about any prior convictions for the defendant regarding operating while intoxicated?

A I don't recall if it was at that point or after.

Q At some point you received information about that.

A Yes.

Q Did the information about prior convictions factor into your decision on arresting him at all?

A Yes.

Q Correct me if I'm wrong, does that mean you received the information prior to the arrest?

A Yes.

Q Okay. Do you know -- if it wasn't at that moment,

do you know when it would have happened?

A Not specifically, no.

Q Did you have any other officer check for the gray van?

A Yes.

Q And was the gray van ever located?

A Yes it was.

Q Describe who did what.

A Officer Stephen had located the van parked on Michigan Avenue. I believe it was in the 300 block.

Q Were you provided any information about whether or not there was any damage to that vehicle?

A He indicated -- Officer Stephen did -- that there was some minor damage that appeared to be fresh I believe to the side mirror area.

Q And were you able to confirm that this is the same van that was discussed by Ms. Mitchell earlier?

A Yes. And that was by vehicle registration.

Q Okay. Did you have the defendant submit to any standardized field sobriety tests?

A No.

Q Why is that?

A Based on his current condition he was stumbling, could barely stand without being held, and I didn't

feel it would be safe for him to perform those tests.

Q Did you have any preliminary breath test performed?

A Yes.

Q When -- at what point was that done?

A Just prior to the arrest.

Q And would that have been then on the street where you had initial contact with him?

A He was actually brought over to the front of my squad car where I performed the test. Or administered the breath test.

Q I'm not sure if we established this earlier, but where in -- where did you have the contact with him?

A It was on St. Clair Avenue just east of the intersection of Eighth Street and St. Clair Avenue.

Q And that's, again, in the city of Sheboygan, Sheboygan County, Wisconsin.

A Yes.

Q And if someone were to walk from the lake to the location where Mr. Swenson described seeing Mr. Mitchell, would they have to go through the location that you guys were in?

A I'm sorry, can you repeat the question?

Q Sure. If someone's in Sheboygan -- you're familiar

with the city?

A Yes.

Q In Sheboygan if someone's down by the lake, near Michigan Avenue and the lake, if they want to get back to the area where Mr. Swenson described initially seeing Mr. Mitchell, and you said that Mr. Swenson was near Eighth and St. Clair looking out a window when he saw Mr. Mitchell, would they have to walk through the location where you currently are having contact with Mr. Mitchell to get there?

A Potentially. I mean, we were probably 30, 40 feet west of his residence where he actually was on the Eighth Street side, and the lake would be from his residence to the east, and he lives 700 block of St. Clair Avenue.

Q Okay. When you administered the preliminary breath test what was the result?

A .24.

Q As a result of the arrest and your observations -- as a result of the preliminary breath test and your observations of the defendant as well as his statements, what did you do?

A Make an arrest for operating while intoxicated.

Q And what, if anything, did you do next?

A He was placed in the back seat of my patrol vehicle, and I brought him to police headquarters for further processing.

Q Where is police headquarters?

A North 23rd Street in the city of Sheboygan.

Q And about how long generally would it take you to get from where you initially had this contact with Mr. Mitchell to the time you got to the Police Department?

A About five minutes maybe.

Q And what, if anything, did you notice about the defendant's condition during this time?

A It was declining.

Q What do you mean by that?

A He was becoming more lethargic in his movements, had greater difficulty in maintaining balance, had to be physically helped out of the squad car when we got there. And once he was in a holding cell with his handcuffs removed, he began to close his eyes and sort of fall asleep or perhaps pass out. But he would wake up with stimulation. And based on that condition, I didn't feel that a breath test would be appropriate. After talking to my lieutenant, we decided that a blood test would be more appropriate, and I brought him to Memorial

Medical Center.

Q And again, about how much time passes by the time you get to Memorial?

A From the time I left the police station?

Q Yes, sir.

A Eight minutes maybe.

Q And when you arrived at Sheboygan Memorial where was Mr. Mitchell at that point?

A He was in the back seat of my squad.

Q What, if anything, did you notice about his condition at that time?

A He appeared to be completely incapaciteted, would not wake up with any type of stimulation, and had to be escorted into the hospital by wheelchair. Myself and another officer had to lift him into the wheelchair as he could not hold himself up, would not wake up, and his eyes were closed.

Q Describe the efforts you made to try to wake him up.

A I would shake his arm, lift up his hands, shake his hands, rub the top of his head.

Q Did he make any statements to you?

A Not at that point, no.

Q And how did you get him from the squad car into Sheboygan Memorial?

A By a wheelchair. I pushed him.

Q And while he was in the wheelchair, what was his posture like?

A He was slumped over in the chair, could not lift himself up with any type of, like, sitting in a normal position.

Q And what did you do next?

A I completed the blood evidence paperwork. It's standard procedure. And I read him the Informing the Accused form verbatim from the form. He was so incapacitated he could not answer.

Q I'm going to have marked, Officer, Exhibit 1.

ATTORNEY WINGROVE: I think we should mark it as Exhibit 2 because I have an offer of proof I brought in as Exhibit 1 a while ago. Would just be a cleaner record.

THE COURT: That was brought in on a different day.

ATTORNEY WINGROVE: Absolutely.

THE COURT: Why don't we just call it 1A.

BY ATTORNEY HARRIMAN:

Q Officer, I stand corrected. I'm going to show you what's been marked as Exhibit 1A. Can you identify this, sir?

A Yes I can.

Q What is it?

A This is the Informing the Accused form, a copy of it, that I had read to Mr. Mitchell. After reading through the form, he was so incapacitated that he could not answer the question of "Will you submit to an evidentiary chemical test of your blood?"

Q And Officer, is that the actual form you completed in this case?

A Yes.

Q Exhibit 1A has several paragraphs here towards the top that are computer printed. Do you see that?

A Yes I do.

Q Did you read these paragraphs verbatim to the defendant?

A Verbatim, yes.

Q And when you got to the point of the second half or the lower portion of this form, is this your handwriting on the form?

A Yes it is.

Q And is that your signature in the lower right corner?

A Yes it is.

Q And is there an indication as to the date and time that this form was completed?

A Yes there is.

Q What is that?

A Dated 5-30 of '13 at 1724 hours.
Q And do you recall when your arrest was made?
A No I don't.
Q I'm going to show you what's going to be marked as Exhibit 2. Showing you Exhibit 2. Do you recognize this, sir?
A Yes I do.
Q What is that?
A This is the Alcohol Influence Report.
Q And did you complete that in reference to this case?
A Yes I did.
Q And is that your handwriting on the form?
A Yes it is.
Q Is that a true and accurate copy of the form that you completed in this case?
A Yes it is.
Q And in that form does it indicate your arrest time?
A Yes it does.
Q And what time is that?
A 4:26 p.m.
Q And when you compare your arrest time to the time of reading the Informing the Accused, what's the difference there?
A Approximately one hour.

Q Based upon your recollection of the incident, does that time frame sound about right from what you testified --

A Yes.

Q -- to in terms of the arrest, going to the Police Department, and then ultimately going to Sheboygan Memorial?

A Yes.

Q And what did you write down as a response on Exhibit 1A in reference to will he submit to an evidentiary chemical test?

A "Couldn't speak slash incapacitated."

Q And did you mark a box?

A Yes I did.

Q And what was the box?

A Yes.

Q And as a -- on Exhibit 2 of the Alcohol Influence Report, did you indicate anything in reference to the preinterrogation warning section? In other words, when you asked -- did you ask any questions about drinking history after he was arrested?

A No I didn't.

Q Why was that?

A He was incapacitated.

Q And is that indicated on Exhibit 2?

A Yes.

Q Now?

A I wrote the words "incapacitated" across the signature field.

Q Just so I am clear and the record's clear, when you say incapacitated, what are you talking about?

A He physically could not answer, was not awake, was not alert.

Q And Officer, did you summon the -- strike that. After reading the Informing the Accused and the defendant didn't respond, what happened next?

A Blood evidence was obtained by the phlebotomist at the hospital.

Q And did you call for any other assistance in relation to the defendant's physical status?

A I didn't specifically request it. I had made mention of his current condition to hospital staff. Perhaps the amount of time between the time of arrest and the time the form was completed I do recall that, you know, medical efforts were being attempted at the same time that I was waiting for the phlebotomist. I recall that Mr. Mitchell was so incapacitated and couldn't answer any hospital staff as I stood next to him as well and did not awake while they placed catheters or any other type

of medical instruments on him.

Q I'm going to show you what's been marked as Exhibit 3. And Officer, I want to clarify with you this Exhibit 3 before you go over and identify it. You can see Exhibit 3 is two pages. It's a front and back, right?

A Yes.

Q The front I'm going to ask you to talk about. The front is identified as having the exhibit sticker. The back I'm not going to ask you any questions for. It's unfortunately just a lack of doing a good job of copying on my part.

ATTORNEY WINGROVE: And just so the record is clear, we would for reasons I'll explain otherwise, we would object to the back part of the document being received into evidence.

THE COURT: What is Exhibit 3?

ATTORNEY WINGROVE: That would be the WSLH laboratory report.

THE COURT: Do we really need the lab report?

ATTORNEY HABERMAN: What Attorney Wingrove -- the lab report is the part that we're not going to talk about.

ATTORNEY WINGROVE: Why don't I give you my file copy of that document, and it won't have the lab report

on the back of it, and I'll just trade you if that's acceptable.

BY ATTORNEY HABERMAN:

Q I'm going to reshow you what's been remarked as Exhibit 3 so we don't have this problem of a back side of a page. Do you recognize Exhibit 3, sir?

A Yes I do.

Q What is that?

A This is the State of Wisconsin Blood/Urine Analysis form that is completed during the blood draw.

Q And in fact, do you complete part of that form?

A Yes I do.

Q What part?

A The upper portion, parts that are listed A, part B, and part C.

Q And is this the form that you completed in this case?

A Yes it is.

Q At what point in the process do you complete this form?

A Just prior to the blood draw.

ATTORNEY WINGROVE: And again for the record I have no objection to the form being received for what the officer did and what he said. But the parts of the form that are filled out by someone else, we would be objecting to them

being received as I don't think the appropriate steps have been taken for that information to be disclosed or redisclosed.

THE COURT: I really don't understand why there's an objection. I think all we're here today is whether or not there was a violation of Mr. Mitchell's rights when the blood was drawn. Isn't that the whole issue?

ATTORNEY WINGROVE: Yes. But again, I'm going to take this in a slightly different direction and suggest that the blood draw made at the hospital by the hospital staff under the facts and circumstances as they then existed is subject to confidentiality under the federal rules brought by 92 DHS.

THE COURT: I'm hesitating because that's -- as I read your motion, that's not what I understood this to be today.

ATTORNEY WINGROVE: That is correct. The motion is a straight suppression motion. But I did alert the Court that I was going to be making this argument, and this is an extension of the motion saying they should have had a warrant to get that blood. And now the argument's going to be because that blood draw is subject to federal confidentiality rules.

THE COURT: I'll receive it the way it is. I've never had a motion like this before. I'll receive the

exhibit as it stands. If I look at it and I see something in the document that appears that it should not have been admitted, then I'll reconsider, but I'll accept it the way it stands.

ATTORNEY WINGROVE: I understand the ruling. I just ask the record reflect a continuing objection.

THE COURT: That's fine.

BY ATTORNEY HABERMAN:

Q Officer, are you present when anyone else completes parts of that form?

A Yes.

Q And what part would that be?

A Part D and part E.

Q And what is part D generally?

A The type of specimen that is being collected, the collection date, and the collection time.

Q And the person collecting is on there too?

A Yes.

Q And what's the person's name on the form?

A Jennifer Gatzke.

Q Was -- based on your recollection was that the person who collected the blood in this case?

A Yes it was.

Q And is there a time that's indicated as to when the blood was collected?

A Yes there is.

Q When is that?

A 1759 hours.

Q Based on your recollection and your presence during completing this form and Ms. Gatzke completing this form, is that time accurate?

A Yes it is.

Q When -- did Ms. Gatzke collect the blood of the defendant?

A Yes.

Q And was that blood turned over to you?

A Yes it was.

Q Okay. Do you recall what was going on at the time that the blood draw was being performed in terms of medical treatment, if any?

A At the specific time I believe he was just being monitored at that time. I don't know of any other medical procedures being done.

Q You mentioned at one point in your testimony about a catheter. Do I understand right?

A Yes.

Q Okay. Tell me about what happens when you're at the hospital then. Take me through this to the blood draw moment. Do other hospital staff get involved in medical treatment prior to the blood

draw?

A Yes.

Q Okay. Tell me about what you saw generally. I'm not interested in the very specifics, but who's doing what at what time?

A I recall specifically one nurse inserting a catheter into his penis attempting to obtain a urine. Other than that I'm not a medical professional. I don't recall specifically what other procedures were done.

Q Were people working on him other than that?

A No. They were basically just monitoring him during that time frame.

Q And I just want to make the record clear on this 'cuz I'm just trying to picture this in my mind. When you guys arrive at the hospital, is it like you're going to an emergency room treating someone who has just been injured, or is it like you're doing an OWI investigation, or something else?

A Doing an OWI investigation. However, it was unusual that he was incapacitated to the point that he was. Medical staff were monitoring his condition. They were certainly aware of his condition. And -- yeah.

Q Did you guys go into an emergency room, or did you

go into a different room where a blood draw is done?

A This is done in an emergency room where typically all the other emergency -- I'm sorry -- the emergency room is used for the blood draws itself.

Q Okay. You went to the room where the blood draws are normally done.

A They're typically done right in the room we go in. It's -- typically there's one room we usually use. However, we were in the room next to that one because of his condition.

Q Okay.

ATTORNEY HABERMAN: I don't have anything further, Judge.

THE COURT: Thank you. Mr. Wingrove.

CROSS-EXAMINATION

BY ATTORNEY WINGROVE:

Q First I want to ask you some general questions about Alvin Swenson. Do you know Mr. Swenson at all?

A Yes. I've met Mr. Swenson.

Q How many times?

A Once I believe

Q Did you have any other knowledge from Mr. Swenson you gained from other law enforcement?

A I've known of Mr. Swenson through other investigations that I was part of, but I never met him as a result.

Q Okay. And when you say you met him once, you mean this occasion on May 30th?

A Yes.

Q Okay. What generally did you know of Mr. Swenson? Did you know if he was reliable?

A I don't have an answer for that question.

Q Did you know if he was a criminal?

A I was involved in criminal investigations with him.

Q What were the nature of those investigations?

ATTORNEY HABERMAN: Judge, I'm going to object to irrelevant for today's purposes.

THE COURT: I think the question is relevant to a point. But it goes to Mr. Swenson's credibility and what the officer knew about Mr. Swenson.

THE WITNESS: Could you repeat the question?

BY ATTORNEY WINGROVE:

Q Did you know if Mr. Swenson was a criminal?

A Yes. I know he had been arrested.

Q Do you know whether he's been convicted?

A I don't recall specifically.

Q Do you know how many times? I'm sorry. I withdraw the question.

When you went to speak with Mr. Swenson, did you know where he was living?

A Yes.

Q What was -- what's your understanding of where he's living?

A It's a temporary living facility.

Q For what sort of individual?

A People that are released from jail.

Q Did he appear to be under the influence of any intoxicants?

A Not that I noticed. I'm assuming you mean Mr. Swenson?

Q Yeah. I'm sorry. Thank you. Yes.

A Okay.

Q What was his mannerism like when you spoke to him?

A He seemed genuinely concerned for Mr. Mitchell.

Q What does that mean? Was he excited? Was he sad? Was he happy? Was he talking fast? Was he talking slow? What were his mannerisms like?

A He was legitimately concerned. He really wanted us to go out and find him and make sure he was okay. He stressed that to us several times.

Q Now, you've been involved in numerous OWI investigations, right?

A Yes.

Q You received training in OWI investigations, right?
A Yes.
Q You said you went to try to wake Mr. Mitchell up at one time, right?
A Yes.
Q What did you do?
A I shook him several times, shook his arms. Called his name.
Q Did you attempt a deep sternum rub?
A I don't believe so.
Q Is that one of the things you're trained to do?
A I don't believe I was ever trained to do that.
Q Have you ever done that?
A Not -- I mean, I've rubbed people's chests before but -- I mean, I'm not trained in the deep sternum rub that you're asking about.
Q Is that typically used to arouse unconscious people?
A It can be.
Q Have you taken anyone in to a 51.15 emergency detention in Sheboygan?
A Yes.
Q Where do you take them to?
A Memorial.
Q How about 51.45? Have you done one of those, an

alcohol detention?

A Yes.

Q Where do you take 'em to?

A Memorial.

Q Now I want to direct your attention to May 30th and just try to build a time line for a minute here if we may. You were dispatched at about 3:17, correct?

A Yes.

Q You probably arrive within about five minutes. That's consistent with your testimony at the preliminary hearing, correct?

A Correct.

Q How long did you speak to Mr. Swenson for?

A I don't recall specifically.

Q Okay. Well, let's try it this way. Say you got there about 3:22, 3:25. How soon -- when did you get the call from the community service officer?

A That was after I had talked to Mr. Swenson. I was out in my patrol car trying to find investigative information, perhaps a license plate, providing a text message on a computer or over the radio to other officers to assist in locating him.

Q So you're doing that for a while?

A It took a few minutes, yes.

Q About how long?
A I don't recall. I also had a conversation with Mr. Mitchell's mother at the same time trying to gain information from her.
Q When did you first have contact with Mr. Mitchell?
A After the CSO had informed me of the suspicious individual.
Q Okay. And according to the -- I think it's Exhibit 2 -- you arrested Mr. Mitchell at 4:26. How much time did you spend with Mr. Mitchell talking to him before you arrested him?
A I don't recall specifically.
Q You think it would have been a half hour?
A I don't think that long, no.
Q Less than a half hour.
A I would think so, yes.
Q Okay. And if I told you that I reviewed the video and you put him in the back of the squad car at about 4:15, that would be consistent?
A If that's what the video said.
Q You wouldn't dispute that.
A If that's what the video says I wouldn't.
Q Okay. And then you take Mr. Mitchell to the police station. Do we know what time we arrived?
A No I don't.

Q How long were you at the hospital before you read him the Informing the Accused?
A I don't recall specifically.
Q There was some mention about the room the blood draw was done in. Is that done in the ER?
A Yes.
Q Okay. Is the ER one big room, or is it a large room with little rooms facing off of it?
A One room with a lot of little rooms facing off of it.
Q Okay. And the blood draw wasn't done in the usual blood draw room owing to Mr. Mitchell's medical condition, right?
A Yes.
Q And the medical condition was that he was unconscious, right?
A Yes.
Q And he was admitted to the hospital, correct?
A Yes.
Q And you testified that you saw at 1759 the blood draw was performed, right?
A Yes.
Q And that was about 35 minutes after you read the Informing the Accused to Mr. Mitchell, right? It's math.

A Yeah.
Q 1724, 1759. The phlebotomist was an employee of the hospital, right?
A Yes.
Q And did she put identifying information on the blood sample she drew?
A On the samples itself, the tubes?
Q Yeah.
A I believe she initials the tape that's on there.
Q And was there some sort of identifying information for Mr. Mitchell put on those? I mean, there's got to be some way to track it, right?
A Yeah.
Q So did you see that happen or not?
A I don't recall specifically, no.
Q But it's your understanding that customarily happens, right?
A I believe so, yes.
Q To establish a chain of custody. That would be correct, right? That's why that happens?
A Yes.
Q You could have gotten a warrant to draw Mr. Mitchell's blood at the hospital, couldn't you have?
A I could have applied.

Q I'm sorry. Yes. You could have applied, correct?
A I suppose.
Q Police do that on a fairly regular basis, don't they?
A Now yes.
Q How long does it typically take?
A I don't know. I haven't done a warrant blood draw yet. We just started doing those.
Q It's fair to say that you watched Mr. Mitchell's condition deteriorate in front of you, right?
A Yes.
Q So if there was some sort of blood alcohol or drug curve going on, the numbers were probably getting higher, not lower, right?
A I don't know that.
Q He got sleepier and sleepier and eventually passed out in front of you, correct?
A In the back of my squad, yes.
Q Okay. Do you know if Mr. Mitchell was eventually admitted to the ICU at Memorial?
A Yes.
Q Was he?
A Yes.
Q Okay. Do you know if he was eventually admitted to 1-K at Memorial?

A That's my understanding.
Q That would be a yes?
A Yes.
Q Just a moment please while I go over my notes. Okay. And the reason you take people for emergency detentions or emergency alcohol detentions to Memorial is because that's where we take them in Sheboygan County, right?
A Yes.
Q Okay. Just a few odds and ends to clean up now please. There was some questioning on direct examination that in order for Mr. Mitchell to come back to his apartment from the lake, he would have to walk through an area where you were standing. Do you sort of remember that?
A Yes.
Q Okay. Is it fair to say -- what direction was Mr. Mitchell moving when you saw him, first saw him?
A From the north to the south.
Q Okay. So that would have been sort of parallel to the lake, correct?
A Yes.
Q So it's possible he could have come back from the lake and taken some other street other than the

street you were standing on, right?

A Yes. I did not see him on St. Clair Avenue.

Q And there's other ways to get from the lake to where you saw him than just St. Clair Avenue, right? There's a lot of other streets.

A Yes. St. Clair would be the most direct.

Q You testified when you got back to the station you spoke with your supervisor, and you decided a blood draw would be more appropriate. You remember that?

A Yes.

Q Why?

A Because of his current condition.

Q That being that he was unconscious?

A He was not unconscious quite. I mean, he was closing his eyes, and I mean, he was arousable.

Q Okay. If he was going progressively downhill in front of you, why didn't you read him the Informing the Accused at that time?

A I don't know.

Q Were you at that time concerned that he was going to pass out?

A It was a concern.

Q Okay. One last point. You had testified that Mr. Mitchell later changed his story.

A Yes.

Q You asked him questions about drinking down at the lake, right?

A Yes.

Q And he admitted to drinking down at the lake, right?

A Not initially, but yes. That's what he had changed his story to.

Q And that was the change in the story?

A Yes.

Q And you don't know whether he walked back from the lake or drove back from the lake, do you?

A He told me that he parked his car on Michigan Avenue 'cuz he was too drunk to drive.

Q And you don't know whether that was before or after he went to the lake.

A No.

Q You said he parked it by the lake. I figured I was too drunk to drive. But you don't know whether he got drunk before or after he parked his van, right?

A Right.

Q And he said he was drinking in his apartment, but you don't know whether he was drinking in his apartment before or after he went to the lake, right?

A He was -- I'm sorry, can you repeat the question?

Q Sure. Mr. Mitchell said he had been drinking in his apartment, right?

A Yes.

Q And you don't know whether he was drinking in his apartment before or after he went down to the lake.

A I don't believe he was in his apartment during the time of my investigation.

Q That's because you knocked on the door and he didn't answer the door, right?

A Right.

Q And later on in your investigation it became pretty clear that he really didn't want to talk to a police officer, didn't it?

A Right.

ATTORNEY WINGROVE: No further questions. Thank you.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY ATTORNEY HABERMAN:

Q Did you ever receive, Officer, any information after Mr. Swenson provided you the information of the defendant getting in his gray van? Did you receive any information after that to suggest that the gray van never returned?

A No.

Q Approximately how far in blocks or however you want to characterize it is the location of where Mr. Swenson observed the gray van near Eighth and St. Clair in relation to the 300 block of Michigan where the van was found?

A Four or five blocks.

ATTORNEY HABERMAN: I don't have anything else then, Judge.

THE COURT: Anything else on that?

ATTORNEY WINGROVE: No. Thank you.

THE COURT: Thank you, sir.

ATTORNEY HABERMAN: Your Honor, for the record I move for the admission of Exhibit 1A, 2, and 3.

THE COURT: Any objection?

ATTORNEY WINGROVE: I just ask the record reflect the previous objections I made, especially to the portions of the blood draw filled out by the hospital employee.

THE COURT: So noted. But they're received. Anything else, Mr. Haberman?

ATTORNEY HABERMAN: No evidence, Your Honor.

ATTORNEY WINGROVE: Just argument, Your Honor.

THE COURT: All right. Mr. Haberman, go ahead please.

ATTORNEY HABERMAN: Thank you, Your Honor. I outline the gist of my argument in my brief to the Court dated October 14th. This is a blood draw pursuant to the implied consent law under 343.305. It is lawful pursuant to that. The fact that this was a blood draw done under the implied consent law means that this was a lawful blood draw and the evidence is lawfully obtained.

Missouri v. McNeely has absolutely nothing to do with this case. In the implied consent law under subsection 343.305(3)(b), a person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent. So we have the status of the law as presuming someone has given consent. And just because their state becomes unconscious or not capable of withdrawing consent doesn't change the fact that they have agreed to have their blood drawn as part of Wisconsin law. Therefore, a blood draw once a person is unconscious pursuant to the implied consent law is still lawful.

We do need to look at a couple decisions to interpret unconscious operator as well as otherwise not capable of withdrawing consent. And that is generally *State v. Disch*, 129 Wis.2d 255 [sic] as referenced in my brief. It is in that case that the phrase unconscious is defined as (as read) "a person who is insensible, incapable of responding to sensory stimuli, or in a state lacking

conscious awareness." That is from page 234.

That is what we had here. That meets the definition as described by Officer Jaeger of the defendant's state. He would further, I guess, could be characterized as otherwise not being able -- otherwise not capable of withdrawing consent, but I think it's more accurate to describe him as unconscious under the definition provided under *Disch*. Although the otherwise is described as (as read) "a person who has conscious awareness and can respond to sensory stimuli but lacks present knowledge or perception of his or her acts or surroundings." There was a discussion in *Disch* about that as well as *Hagaman*, H-A-G-A-M-A-N, which is referenced in my brief.

The bottom line is in this case the defendant was unconscious. It should be noted that in *Disch* the Court -- the Wisconsin Supreme Court said that the officer does not have to provide the information in an Informing the Accused form to a person who is unconscious 'cuz it doesn't serve any means at that point. The officer did do that though here, and that is, I guess, certainly to his credit as he was doing his best to comply with the complied consent law.

Once there was no response the officer could lawfully conduct a blood draw and, in fact, follow the standard procedures that the Court and everyone is familiar with regarding an OWI investigation. There was a blood draw

pursuant to the blood draw paperwork that is typically used, and the blood draw procedure was followed.

There's nothing to suggest this was a forced blood draw. There is nothing to suggest that this is a blood draw on a exigent circumstances situation when there has been a concern for exigency. This is not that case. It's not *McNeely*. It's not *Schmerber*. And it's not *Bohling* in Wisconsin.

Based upon the status of the defendant at the time this was a lawful blood draw. There's nothing about this blood draw that has suggested it was through some other hospital means or hospital record obtaining means. Any such argument I think is merely speculation by the defense.

And on a side note, I would object to the argument about this. I don't think it's properly before the Court. I think the argument about this administrative code in DHS and confidentiality, once the defense filed their brief and cited *McNeely* as their authority to suppress this evidence, I don't think that this issue's appropriately before the Court.

If Attorney Wingrove was, I think, sincere about saying this is really where the issue is, then that should have been included as his authority in his brief, and it should have been articulated in advance to the Court rather than walking into the motion hearing and saying, here's some Administrative Code printouts from Westlaw, and here is my

argument. So I think that that issue is inappropriately before the Court.

That being said, it's a separate concept and distinct from this lawful way of obtaining blood evidence which is done in this case pursuant to the implied consent law.

THE COURT: Thank you. Mr. Wingrove?

ATTORNEY WINGROVE: Thank you. I guess to respond to the last argument first, I did tell the State and the Court I was going to proceed down this path when I first appeared. I received the State's position 48 hours ago, and that precluded me from -- you know, this is the next step. I'm going to file this. I look for them to argue implied consent. Then I'm going to go down this path. It's a logical progress there. If it needs to be briefed, great, it needs to be briefed. If the Court wants me to file a motion on it, I can do that. I can get the transcript from today. I can use that as my evidence.

With that said, we have a warrantless blood draw. They could have got the warrant. They didn't. There were no exigent circumstances. They're arguing implied consent. Okay.

Two basic problems with implied consent as I see it. The first and most significant one is if a police officer's confronted by someone who is gradually losing consciousness,

why not give him the Informing the Accused when he asks him to do the field sobriety. That way the issue's out there. That way you get it taken care of. The officer clearly knows this guy is deteriorating and going down in front of him. Somewhere along the line he should have, could have, should have done that. It would have been proper, would have been appropriate.

I'm also a little bit concerned on the implied consent on the blood draw because apparently there was, like, a 35-minute delay between reading the Informing the Accused and having the blood draw occur.

And I'm sorry, I need to digress for a moment. The implied consent cases the State relies upon talk about a situation where the officer comes upon an unconscious person. That's not this case. In this case the officer is talking to the person. The officer is asking him questions, asking him to perform field sobriety tests. So that distinguishes those cases and gives this case a different posture.

The last thing that we have is the blood draw that was made. The blood draw was made by a hospital employee. It's a facility that receives people under 51.15 and 51.45. That my client was obviously a patient at the time 'cuz he was receiving treatment. Any identifying information from the hospital as a treatment record, that would include his name on the blood vial, and they're all subject to federal

confidentiality laws under 92 -- DHS 92, and there is a procedure for the disclosure of that information. And that's set under 42 CFR part two, 2.65. And I've given the Court a copy of that. That procedure wasn't followed. There's another procedure for investigations, but that can't be used in a criminal prosecution.

And finally, if that information is disclosed -- and this is on the last page of the information I've given the Court -- it's a crime to disclose or redisclose that information.

And that information has been disclosed. It has been redisclosed. And frankly, if the State -- I don't think intentionally or maliciously -- but is doing things that are criminal, that's a violation of my client's rights under the Eighth and Fourteenth Amendment to the U.S. Constitution. And the results from that test should be suppressed.

So for all those reasons we would ask that the warrantless blood draw be suppressed 'cuz in the alternative, what they could have done, what they should have done is applied for the warrant and avoided all this other issues that come up on a -- what ends up being a direct admit to a mental health treatment facility. And the testimony was clear. He passed through the ICU to 1-K.

So for all those reasons we ask the evidence from the blood draw be suppressed. And I would note in making

that request that's not going to prevent the State from going forward with this case.

THE COURT: All right. Thank you. Well, regarding the warrantless blood draw, I think the State is correct in their position. And I read the *Disch* case after I got Mr. Haberman's brief. And I find that it gave ample support for the State's position that no warrant was required because Mr. Mitchell was unconscious.

The officer's testimony was that he took Mr. Mitchell after the arrest to the Police Department. Mr. Mitchell was -- it sounded to me like he was kind of with it initially, but he was deteriorating. And they get to the police station, and they're not sure that he can submit to a breath sample. So they take him to the hospital. And on the way to the hospital, he deteriorates to the point where he cannot be shaken awake. To me that's unconscious.

And the law -- when I refer to the law I'm referring to 343.305(3)(b) -- makes clear that an unconscious operator has -- cannot withdraw their consent to a blood sample. The only issue really regarding the warrantless draw is whether or not there is probable cause. That's the threshold question to whether or not you can do the blood sample.

And I find there is probable cause. I think the way the whole investigation went down -- I'm not being critical of anyone because the officer's just following his leads, and

there's really no one other than Mr. Swenson who saw Mr. Mitchell driving. And so there may be proof problems for the State in the long run. But as far as probable cause, I don't have a problem with finding probable cause.

Mr. Swenson said that Mr. Mitchell was drinking. He got into a car. That's what he advised the officer. The officer had contact with Mr. Mitchell's mother to help identify the vehicle. Eventually he finds Mr. Mitchell within the hour, and Mr. Mitchell is very drunk. And he made the comment that he was -- I can't recall precisely what it was, but it was to the effect that he was too drunk to drive. I don't have a problem with probable cause.

Now, as far as the other issue that came up today, I'll entertain it. I agree with Mr. Haberman that notice was faulty. But I feel comfortable proceeding.

And I'm looking at the section that Mr. Wingrove provided to me. That's 42 CFR Chapter 1, Section 2.3(a), and that's Purpose. I'll read what it says. (As read) "Under the statutory provisions quoted in Sections 2.1 and 2.2, these regulations impose restrictions upon the disclosure and use of alcohol and drug abuse patient records which are maintained in connection with the performance of any federally assisted alcohol and drug abuse program."

There's no allegation that what happened was part of a drug abuse program. This is a simple OWI -- don't

interrupt me. I know you want to interrupt me, Mr. Wingrove, but don't.

This is a simple OWI investigation. Nothing more, nothing less. And the officer takes Mr. Mitchell to the hospital as they routinely do on OWI investigations. I don't care if they do Chapter 51.45's at Memorial. It doesn't matter. He takes him there.

They go through the regular procedure. Blood is drawn. And what I think is key is that the phlebotomist then gives the blood back to the officer. That's not part of any treatment program. And the officer does with it what he does. And that's his end with Mr. Mitchell.

At this point if Mr. Mitchell goes from the ER to ICU to 1-K, that's another matter, but that's just a distraction. It's got nothing to do with this case. If the State did try to get information from the hospital regarding Mr. Mitchell after he had been admitted to 1-K, I think there would be a problem. But that's not what's going on. This is just a simple OWI investigation. Nothing more, nothing less.

So for those reasons I'm denying the motion. Anything else?

ATTORNEY WINGROVE: I understand the Court's ruling. I would just direct the Court's attention to DH 92 which says that certain facilities that federal rules become applicable to, and that was -- at that time he was receiving

treatment at the time the blood draw was made. I agree it was separate from, and I understand that.

THE COURT: I think what you're doing, Mr. Wingrove, is just creating a huge distraction. It's a simple OWI investigation. That's it. He's getting no more treatment than any other person who's taken to the hospital for a blood draw when they're drinking and driving. That's it.

All right. Thank you. Do we have a trial date?

ATTORNEY HABERMAN: I'm looking. I don't see that we have a current trial date.

THE COURT: Let's set a trial date for December 17th. December 2nd at four o'clock we had another hearing with Mr. Wingrove. We can put Mr. Mitchell down at that time for motions in limine. Anything else?

ATTORNEY HABERMAN: No. Thank you.

ATTORNEY WINGROVE: Not today.

THE COURT: All right. Thank you.

***** (End of proceedings.) *****

REPORTER'S CERTIFICATE

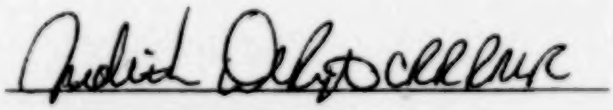
STATE OF WISCONSIN)

) ss

COUNTY OF SHEBOYGAN)

I, Judith M. DeRuyter, Certified Realtime Reporter and Registered Merit Reporter, do hereby **certify by my original signature** that I reported the foregoing matter and that the foregoing transcript has been carefully compared by me with my stenographic notes as taken by me in machine shorthand and by me thereafter transcribed and that it is a true and correct transcript of the proceedings had in said matter to the best of my ability.

Dated this day: September 30, 2014.



Judith M. DeRuyter

Certified Realtime Reporter

Registered Merit Reporter